**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 14, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP616** **Cir. Ct. No. 2004TR17598**

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

---

**IN THE MATTER OF THE REFUSAL OF DAVID N. GULLICKSON:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID N. GULLICKSON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Reversed.*

¶1 HIGGINBOTHAM, P.J.[1] David N. Gullickson appeals a judgment of conviction for violating the implied consent statute, WIS. STAT. § 343.305 (2005-06).[2] Because we conclude that the arresting officer lacked reasonable suspicion to execute a traffic stop of Gullickson's vehicle, we reverse.

## BACKGROUND

¶2 On July 17, 2004, at 2:05 a.m., Wisconsin State Trooper Adrian Logan observed a vehicle driven by a person later identified as Gullickson traveling eastbound on Highway 30. Logan watched the vehicle travel on the white fog line for three or four seconds, then cross over the fog line for another three or four seconds. Logan described the vehicle's movement over the fog line and back as gradual. Logan noted that no other cars were in the area at the time.

¶3 Logan activated the squad car's emergency lights and siren and pulled over the vehicle driven by Gullickson. Logan conducted field sobriety tests and arrested Gullickson for operating a motor vehicle while under the influence of an intoxicant (OWI). Gullickson refused to take a blood test for intoxication.

¶4 Prior to the refusal hearing, the State dismissed the OWI charge. At the hearing, Logan testified that he had ten and one-half years experience as a state trooper, and that he makes approximately eighty OWI arrests per year. The circuit court concluded that reasonable suspicion existed to justify the stop, and that

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

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

probable cause existed to arrest Gullickson for an inappropriate refusal. Gullickson appeals.

## DISCUSSION

¶5 Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a two-step standard of review to questions of constitutional fact. ***Id.*** First, we review the circuit court's finding of historical fact, and uphold them unless they are clearly erroneous. ***Id.*** Second, we review questions of constitutional fact de novo. ***Id.***

¶6 We begin by reviewing the applicable law pertaining to traffic stops. The temporary detention of individuals during automobile stops, even for a brief period and limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment. ***Whren v. United States***, 517 U.S. 806, 809-810 (1996). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." ***Id.*** at 810. Whether reasonable suspicion exists to justify a stop is based on the totality of the circumstances at the time of the stop. *See* ***State v. Johnson***, 2007 WI 32, ¶¶35-36, 299 Wis. 2d 675, 729 N.W.2d 182.

¶7 The State argues the circuit court "did not err in finding reasonable suspicion to stop" Gullickson's vehicle. We disagree. WISCONSIN STAT. § 346.05 provides that, upon all roadways of sufficient width, drivers "shall drive on the right half of the roadway." WISCONSIN STAT. § 346.13(1) and (3) provide, respectively, that drivers on a road divided into two or more clearly indicated lanes "shall drive as nearly as practicable entirely within a single lane" and "shall drive in the lane designated." Neither §§ 346.05 nor 346.13 expressly prohibits

Gullickson's conduct because neither states that the part of a roadway to the right of and including the fog line is not a part of a designated lane. Moreover, the State cites no reported Wisconsin cases, and we are not aware of any, holding that driving over or on the fog line is contrary to these or any other statutes.

¶8 Alternately, the State contends that Gullickson's conduct, if not contrary to WIS. STAT. §§ 346.05 and 346.13, nonetheless supports a reasonable inference of unlawful conduct under the totality of the circumstances. "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). We disagree with the State.

¶9 We conclude, under the totality of the circumstances, that Logan lacked objective grounds from which a reasonable inference of unlawful conduct could reasonably be drawn. Logan observed Gullickson's vehicle drive on the fog line for three or four seconds, then cross over it for approximately the same amount of time. The vehicle's movements were not sudden or abrupt, they were gradual. *Cf.* ***People v. Greco***, 783 N.E.2d 201, 206 (Ill. App. 2003); ***State v. Dorendorf***, 359 N.W.2d 115, 117 (N.D. 1984) ("erratic" weaving sufficient to justify investigative stop) (*noted in* ***State v. Post***, 2007 WI 60, ¶25 n.8, 301 Wis. 2d 1, 733 N.W.2d 634). Logan did not observe the vehicle repeatedly cross the fog line or otherwise deviate from the center of the lane and he saw it pass over the fog line only once. *Cf.* ***State v. Bailey***, 624 P.2d 663, 664 (Ore. App. 1981) (continuous weaving that took place over "substantial distance" sufficient to justify investigative stop) (*noted in* ***Post***, 301 Wis. 2d 1, ¶25 n.9).

¶10 We note that two circumstances, the time of night of the stop (near bar time) and the officer's training and experience (ten and one-half years; eighty OWI arrests per year), argue for the reasonableness of the stop. Each of these factors is a "building block in the totality of circumstances equation." ***State v. Allen,*** 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999). However, we conclude that these two building blocks do not add up to reasonable suspicion under the totality of the circumstances. The investigative stop of Gullickson was therefore invalid.

¶11 The State also argues that even if the traffic stop was invalid, the evidence at the refusal hearing was sufficient to prove the elements of an improper refusal to submit to a blood alcohol test, and therefore the conviction should be affirmed. We disagree. An element of improper refusal is probable cause to believe that the person was operating a vehicle while under the influence of an intoxicant, *see* WIS. STAT. § 343.305(9)(a)5., and, in this case, the evidence essential to proving this element was the fruit of the illegal traffic stop. *See* ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963). Without this illegally-obtained evidence, the conviction cannot be sustained.[3]

*By the Court.*—Judgment reversed.

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

[3] And without the tainted evidence, the only facts that may be relied upon in the probable cause analysis are those observed before the stop. As noted, these facts did not support reasonable suspicion to justify an investigative stop, much less probable cause to make an arrest for a potential offense.