

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2009

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. 2008AP2394-FT

Cir. Ct. No. 2007TR2810

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF BAYFIELD,

PLAINTIFF-RESPONDENT,

V.

GEORGE F. BARNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
JOHN P. ANDERSON, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ George Barnes appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, contrary to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). It is also an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

(continued)

WIS. STAT. § 346.63(1)(b). He contends the court should have granted his motion to suppress evidence obtained during a traffic stop because there was no reasonable suspicion to justify the stop. We disagree and affirm the judgment.

BACKGROUND

¶2 Deputy Edward McKillip of the Bayfield County Sheriff's Department stopped Barnes on December 12, 2007. At the hearing on Barnes' suppression motion, McKillip testified that at approximately 7:00 p.m., after dark, he was patrolling County Road N when he noticed Barnes' vehicle in front of him swerving. County Road N is a two-lane highway, with each lane being about twelve feet wide. The lanes are divided by two solid yellow centerlines. McKillip testified that road conditions were good, aside from some snow in the fog line area.

¶3 McKillip closed the distance between his and Barnes' vehicles and observed Barnes continue to swerve, with his tires touching the centerline four times and the "partially snow-covered fog line area twice." While Barnes' tires did not cross the centerline, McKillip testified that Barnes would have collided with an oncoming vehicle traveling in the same manner. McKillip stated his observations of Barnes' vehicle touching the centerline and fog line occurred over a distance of about one-quarter of a mile. On cross-examination, McKillip admitted he could not remember the sequence in which the four centerline touches and two fog line touches occurred, but he reiterated the line touches occurred in the course of swerving.

On January 22, 2009, the Presiding Judge of the Court of Appeals denied Barnes' motion for a three-judge panel.

¶4 The trial court concluded McKillip had reasonable suspicion to stop Barnes. The court found that Barnes was weaving and his vehicle touched the centerline four times and the fog line twice, which constituted more than merely weaving within his lane. The court further found that McKillip was behind Barnes for several miles, but his observations occurred over a shorter distance. The court also relied on McKillip's testimony that Barnes' driving on the centerline would have caused a collision with an oncoming vehicle driving in the same manner.

¶5 The court also made a number of statements that Barnes criticizes on appeal, contending they were not supported by evidence in the record. For example, the court stated the stop occurred near the "darkest stage of the season" and also that it was a Friday, a "fish fry night." The court also referred to its knowledge of County Road N and that portions of it are straight and others are curvy. The court also referred to the road as being narrow, but this did not "necessarily alleviate[] a driver's obligation, one way or the other." The court further stated,

In fact, I think a reasonable argument can be made that, because it is a narrow passage lane, the driver has to be even steadier of hand, and make sure that they keep their course true, as opposed to a great big wide thoroughfare, where there is a great deal of weaving that can occur quite safely.

The court also noted that the wheels of Barnes' vehicle being on the centerline raised the inference that the frame extended beyond the center of the two-lane road.

DISCUSSION

¶6 To perform an investigatory traffic stop, an officer must have a reasonable suspicion that the person stopped has committed, or is about to commit,

a law violation. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. When reviewing questions of constitutional fact, we apply a two-step standard of review. *Id.* First, we will uphold a circuit court’s findings of historical fact unless they are clearly erroneous. *Id.* Second, based on the historical facts, we review whether a reasonable suspicion justified the stop de novo. *Id.*

¶7 For an investigatory stop to be constitutionally valid, the officer’s suspicion must be based upon “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion” on a citizen’s liberty. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). What is reasonable in a given situation depends upon the totality of the circumstances. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Thus, individual facts that may be insufficient to give rise to a reasonable suspicion when viewed alone may amount to a reasonable suspicion when taken together. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶8 In *State v. Post*, 2007 WI 60, ¶26, 301 Wis. 2d 1, 733 N.W.2d 634, our supreme court refused to adopt a bright-line rule that weaving within a lane of traffic, by itself, gives rise to a reasonable suspicion for a traffic stop. Instead, the court examined the totality of the circumstances and concluded that reasonable suspicion justified the stop. *Id.*, ¶¶29-37. It noted that Post’s weaving constituted more than a slight deviation within his traffic lane. *Id.*, ¶29. The officer in *Post* testified that the lane in which Post was traveling was between twenty-two and twenty-four feet wide, with parking along the curb. *Id.*, ¶¶30-32. Within this wide lane, Post weaved in an “S-type manner,” coming within one foot of the centerline and six to eight feet of the curb. *Id.*, ¶¶31-32. Additionally, the court

noted that Post's weaving continued for two blocks, encroached on the parking area along the curb, and that it occurred around 9:30 at night. *Id.*, ¶36. Taken together, our supreme court concluded these facts created a reasonable suspicion that the driver was intoxicated, justifying a traffic stop. *Id.*, ¶37.

¶9 Here, we conclude McKillip had reasonable suspicion to stop Barnes and investigate whether he was driving while intoxicated. Under *Post*, the reasonable suspicion inquiry is not simply whether Barnes was weaving within his lane, but instead focuses on the totality of the circumstances. *See id.*, ¶26. In *Post*, the court's analysis of the totality of the circumstances focused primarily on the details of Post's weaving. *See id.*, ¶¶29-37.

¶10 Like in *Post*, Barnes was not weaving slightly within his lane. Barnes' swerving repeatedly brought his vehicle into contact with both the centerline and fog line. Moreover, while the tires of Barnes' vehicle did not cross the centerline, McKillip testified Barnes would have collided with an oncoming vehicle driving in the same manner. For such a collision to occur, some portion of Barnes' vehicle necessarily breached the center of the roadway. Thus, Barnes' swerving was not confined to his traffic lane.² The swerving also occurred in the evening, at 7:00 p.m., but the timing is not as significant as the swerving itself.

¶11 Barnes points to our supreme court's statement in *Post* that the facts there presented a close case, *see id.*, ¶27, and he argues the weaving here was less severe than in *Post*. Barnes also contends the court inappropriately considered

² We note that, with limited exceptions, driving left of center on a two-way roadway is a traffic violation, which would provide an independent basis for stopping Barnes. *See* WIS. STAT. § 346.05.

facts not in the record. Comparing this case to *Post*, Barnes argues there was no testimony of Barnes traveling in an S-like manner, that McKillip could not recall the specific sequence of the six line touches and admitted some line touches on a given side may have been consecutive, and that Barnes was weaving less severely than *Post* in a narrower traffic lane. Barnes also argues that his driving was “exemplary” for most of the several miles McKillip was behind him, and that McKillip only observed the line touches over one-quarter of a mile.

¶12 First, contrary to Barnes’ assertion, there was no evidence suggesting that any of his driving was exemplary. While McKillip was behind Barnes for several miles, he was not observing Barnes’ driving until, from a distance, he noticed Barnes swerving. Only then did he catch up to Barnes and observe Barnes’ driving more closely.

¶13 As for McKillip’s failure to describe Barnes’ driving as “S-like,” nothing in *Post* requires the use of this terminology. McKillip specifically and repeatedly described Barnes’ driving as swerving. For example, when pressed about whether any of the line touches on a given side could have been consecutive, McKillip responded they could have been, but as part of swerving. Thus, the possibility of consecutive line touches did not negate McKillip’s testimony of swerving; it just meant Barnes did not necessarily touch the fog line or centerline every time he swerved left or right.

¶14 Further, that *Post*’s weaving in a larger traffic lane may have been wider than Barnes’ weaving in a narrower traffic lane does not make Barnes’ driving less suspicious. Unlike in *Post*, Barnes drove on the lines marking the boundaries of his traffic lane. Also, Barnes’ driving caused his vehicle to cross the center of the roadway.

¶15 Finally, we address Barnes' challenge to the facts he contends were not in the record, yet were relied upon by the trial court. Because our review of the historical facts is de novo, this challenge only affects what historical facts we consider. See *Powers*, 275 Wis. 2d 456, ¶6. Our calendar confirms that December 12, 2007, was a Wednesday, not a Friday. Also, the court's statement about nearing the darkest part of the season does not affect our review; McKillip testified it was dark. Further, our decision does not rely on the circuit court's personal knowledge of County Road N. As for the frame of Barnes' vehicle extending out from the tires, no unreasonable inferences about the vehicle's frame were necessary because McKillip testified Barnes would have collided with an oncoming vehicle driving in the same manner.

By the Court.—Judgment affirmed.

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

