

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 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. 2008AP2155-CR

Cir. Ct. No. 2007CT113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD SOLETSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
MICHAEL T. JUDGE, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Chad Soletske appeals a judgment of conviction for operating while intoxicated, third offense. Soletske contends the circuit court erroneously denied his motion to suppress. We disagree and affirm.

BACKGROUND

¶2 The Oconto County Sheriff's Department received a call from Quinn Ambrosius at approximately 12:30 a.m. on September 16, 2007. The dispatcher testified Ambrosius reported a smaller, dark vehicle was in the ditch and had struck a fence. Ambrosius also stated he believed the occupants were intoxicated. After alerting the squads that were on duty, the dispatcher received another call from Ambrosius. He stated the vehicle was out of the ditch and he was following it northbound on U.S. Highway 141. When a responding police car pulled behind the vehicle, Ambrosius told dispatch they had the correct car and he would pull over to give a statement. Ambrosius later spoke with the officers on the scene and provided a written statement.

¶3 Trooper Kevin Schneider responded, pulled behind the suspect vehicle, and was told he was following the correct vehicle. Schneider testified he observed the car drive over the lane divider line and then drive with his tires on the lane divider for approximately one-tenth of a mile. He then activated his emergency lights and stopped the vehicle. Additional officers arrived shortly thereafter.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Chad Soletske was the driver when the vehicle was stopped, but both occupants told police the passenger had been driving when the accident occurred. Soletske's eyes were red and glassy and officers smelled the odor of intoxicants coming from him. The officers found an open can of beer on the passenger floor and observed severe damage to the front of the vehicle. Soletske told the officers he had been drinking beer. However, he completed two out of three field sobriety tests without exhibiting any clues of intoxication.² Schneider then told him, "What I'd like you to do now is take a deep breath and blow into the P.B.T." Soletske complied and registered a .176% blood alcohol content. He was then arrested for OWI and operating with a revoked license.

¶5 Soletske filed a motion to suppress, arguing (1) there was no reasonable suspicion for the traffic stop, (2) there was no probable cause to request a preliminary breath test (PBT), and (3) the officer lacked probable cause to arrest. After the circuit court denied the motion in a written decision, Soletske pled no contest to OWI, third offense, and operating after revocation.

DISCUSSION

¶6 Soletske first argues Schneider did not have reasonable suspicion to stop his vehicle. An officer initiating an investigative stop must have reasonable suspicion that the driver or occupants of the vehicle have committed a crime or traffic law violation. *See State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. The question of whether a traffic stop is reasonable is a mixed

² Soletske argues the third test was administered incorrectly. The State neither denies this nor relies on the test results in its argument. We would come to the same result regardless of whether we considered Soletske's performance on the third test.

question of law and fact to which we apply a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. *Id.*

¶7 In some circumstances, information contained in an informant's tip may justify an investigative stop. *Rutzinski*, 241 Wis. 2d 729, ¶17. In assessing the reliability of a tip, we consider the informant's veracity and basis of knowledge. *Id.*, ¶18. The reasonableness of a stop is determined based on the totality of the circumstances. *Id.*

¶8 Soletske challenges the tip as a basis for the stop because Ambrosius did not provide the license plate number or make, model, and color of the vehicle. However, it would have been dark at that early hour and Ambrosius stated the vehicle's license plate lamp was burned out. Regardless, those factors are irrelevant given that Ambrosius followed the vehicle, updated its location and direction of travel, and told police they stopped the correct vehicle. Ambrosius's tip was reliable because he was relaying personal observations of the vehicle's contemporaneous location and progress. *See id.*, ¶33. Additionally, unlike the anonymous tipster in *Rutzinski*, Ambrosius identified himself to dispatch. *See id.*, ¶32. Therefore, Schneider could reasonably conclude Soletske's vehicle was the one involved in the accident.

¶9 Soletske also contends his driving on the lane divider line did not violate WIS. STAT. § 346.13. That statute provides:

Whenever any roadway has been divided into 2 or more clearly indicated lanes, including those roadways divided into lanes by clearly indicated longitudinal joints, the following rules ... apply:

(1) The operator of a vehicle shall drive as nearly as practicable entirely within a single lane

Soletske misrepresents the record when he asserts his vehicle only traveled on the lane divider line.³ The circuit court appropriately found that “Schneider observed the vehicle travel partially into the left lane....” Therefore, we need not decide whether merely traveling on the dividing line runs afoul of the requirement that a vehicle be driven “entirely within a single lane.” WIS. STAT. § 346.13(1).

¶10 Considering the totality of the circumstances, we conclude Schneider had reasonable suspicion to stop Soletske for driving while intoxicated. Schneider knew the vehicle had gone off the road and struck a fence at 12:30 a.m., the tipster thought the vehicle’s occupants appeared intoxicated, and the vehicle left the scene of the accident. Additionally, Schneider personally observed the vehicle travel into the left lane and then drive a short distance with its tires on the lane divider line. Further, as an independent basis justifying the stop, Schneider had probable cause to believe Soletske violated WIS. STAT. § 346.13(1).

¶11 Soletske next asserts there was no probable cause to request a PBT. WISCONSIN STAT. § 343.303 states a law enforcement officer may request a PBT if the officer has “probable cause to believe” the driver violated the laws against OWI. The statute further provides that an officer may use the PBT result to help determine whether to arrest a driver. “[P]robable cause to believe’ refers to a quantum of proof greater than the reasonable suspicion necessary to justify an

³ Soletske also misrepresented the record by failing to acknowledge the testimony that his license plate lamp was burned out; mischaracterizing the dispatcher’s testimony regarding Ambrosius’s speculation about the vehicle make and model; claiming the odor of intoxicants came from the vehicle rather than Soletske’s person; and describing his vehicle’s make, model, and color, when the record is devoid of such evidence.

investigative stop, ... but less than the level of proof required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis.2d 293, ¶47, 603 N.W.2d 541 (1999).

¶12 Here, when Schneider requested the PBT, numerous factors indicated Soletske may have been operating while intoxicated: The named informant reported the vehicle’s occupants appeared intoxicated; Schneider observed Soletske drive over the lane dividing line and then continue driving with his tires on the line; the vehicle had been in an accident causing serious damage around 12:30 a.m. and Soletske had fled the scene; two officers smelled the odor of intoxicants coming from Soletske; an open beer can was found in the vehicle; Soletske admitted he had been drinking beer; and Soletske’s eyes were red and glassy. While Soletske successfully performed two field sobriety tests without exhibiting a single clue of intoxication, we conclude the totality of the circumstances gave Schneider the requisite probable cause to request the minimally intrusive PBT.

¶13 Finally, Soletske argues the police did not have probable cause to arrest him. He asserts we should disregard the PBT results because he did not voluntarily submit to the test. Soletske emphasizes WIS. STAT. § 343.303 only permits officers to request a PBT. However, once again, Soletske misrepresents the record. He asserts the officer instructed him to “take a deep breath and blow into the P.B.T.” As set forth earlier in this decision, that was not Schneider’s entire statement. Soletske cites no evidence supporting his claim Schneider instructed him to take the PBT “as a show of authority.” Indeed, Soletske did not testify at the suppression hearing. Therefore, the circuit court appropriately concluded Schneider requested, rather than demanded, Soletske take the PBT.

Soletske does not contend the police lacked probable cause to arrest if the PBT results are considered.

By the Court.—Judgment affirmed.

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

