COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2018-CR **Cir. Ct. No. 2006CF233**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Steven Martin appeals a judgment of conviction for possessing drug paraphernalia, contrary to WIS. STAT. § 961.573(1). He contends

[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.

the court erroneously denied his motion to suppress evidence obtained during a traffic stop, claiming reasonable suspicion did not exist to justify the stop. We disagree and affirm the judgment.

BACKGROUND

¶2 At Martin's suppression hearing, DNR Conservation Warden Frederick Peters testified that, on May 7, 2006, he was driving southbound on State Highway 107 near New Wood County Park north of Merrill. Peters was driving an unmarked truck and hauling a boat. Around 8:30 p.m., a vehicle driven by Martin pulled out in front of Peters from New Wood Park.

¶3 Peters observed Martin's vehicle "drifting within the lane of traffic" for about four and one-half to five miles. Martin drifted onto and over the fog line several times. Martin also drifted onto the centerline several times and crossed the centerline once during a "hard left-hand corner." Peters stated that when Martin's vehicle reached the fog line or centerline, it would have a "quick, corrective action back into the lane, which is unusual." Peters also described these corrective actions as "jerky."

¶4 Peters reported Martin's driving to the Lincoln County Sheriff's Department. Peters described his observations to Deputy Nathan Walrath, who requested that Peters perform a traffic stop. Peters performed the traffic stop, which ultimately led to Martin's arrest.[2]

[2] Martin does not challenge Peters' authority to perform the traffic stop.

DISCUSSION

¶5 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.***

¶6 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 that intrusion" on a citizen's liberty. ***Terry v. Ohio***, 392 U.S. 1, 21 (1966). What is reasonable in a given situation depends upon the totality of the circumstances. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56-58, 556 N.W.2d 681 (1996). Thus, individual facts that may be insufficient to give rise to reasonable suspicion when viewed alone may amount to reasonable suspicion when taken together. ***Id. at*** 58. An officer need not rule out innocent behavior before initiating a traffic stop. ***Id.*** at 59. In ***State v. Post***, 2007 WI 60, ¶¶26-27, 301 Wis. 2d 1, 733 N.W.2d 634, our supreme court refused to adopt a bright line rule regarding weaving within one's traffic lane, concluding that "whether weaving within a single lane gives rise to reasonable suspicion requires an examination of the totality of the circumstances."

¶7 We conclude the totality of the circumstances created reasonable suspicion justifying a traffic stop. Martin was not weaving slightly within his

traffic lane. *See* ***id.***, ¶29. He weaved the full width of his lane, his vehicle repeatedly touching, and on one occasion crossing, the centerline. His vehicle also crossed the fog line several times. Further, when Martin reached the fog line and centerline, he sharply jerked his vehicle back toward the center of his lane. As Peters noted in his testimony, this was unusual driving behavior. Peters observed Martin's erratic driving for about four and one-half to five miles. The driving also occurred in the evening after Martin was seen exiting a park. These facts, taken together, created reasonable suspicion that Martin was driving while under the influence of an intoxicant and justified an investigatory stop. *See* ***id.***, ¶¶29-37.

¶8 Martin argues he only crossed the centerline after Peters decided to stop him. He implies his crossing the centerline should therefore not be considered part of the totality of the circumstances, even though it occurred before Peters initiated the traffic stop. Martin then argues, absent his crossing the centerline, his other driving constituted innocent weaving that could not justify a traffic stop.

¶9 This argument is without merit. The totality of the circumstances includes everything up to the point when Martin was seized under the Fourth Amendment. ***Powers***, 275 Wis. 2d 456, ¶8. In the case of a traffic stop, a seizure occurs when the driver yields to the officer's show of authority. *See* ***id.*** Here, that occurred when Martin pulled over in response to Peters' emergency lights. *See* ***id.*** Thus, the centerline crossing was part of the totality of the circumstances. As discussed above, those circumstances justified the traffic stop. Further, even if the one centerline crossing were disregarded, Martin's repeated drifting onto the

centerline and fog line, combined with his unusual driving maneuvers, would still provide reasonable suspicion for the stop.[3]

¶10 Martin also argues there were other circumstances critical to the reasonable suspicion inquiry. Martin contends Peters was mistaken about the speed limit when he first encountered Martin, which caused Peters to mistakenly believe Martin was driving below the speed limit. Martin asserts this fact was "essential" because Peters stated in his report that Martin's slower speed was what initially caught his attention. Martin also argues Peters did not communicate both of their speeds to Walrath, and therefore Walrath had an imperfect picture from which to determine whether Martin should be stopped.[4]

¶11 Peters' testimony about Martin's erratic driving did not focus on either's driving speed. The critical aspects of Martin's driving were his drifting and jerkiness described above. Nothing in the record about Martin's or Peters' speed negates Martin's erratic and suspicious driving.

¶12 Finally, Martin contends there was an innocent explanation for his driving. Relying on WIS. STAT. § 346.07(3), Martin contends his driving was consistent with someone who believed he was about to be passed. Under § 346.07(3), "Except when overtaking and passing on the right is permitted, the

[3] We note that when attempting to minimize his erratic driving, Martin misrepresents the testimony in the record. He contends he only touched the centerline once. However, Peters testified Martin's vehicle *crossed* the centerline once; his vehicle *touched* the centerline several times.

[4] This argument implies that the facts for the reasonable suspicion inquiry consist of what Walrath, not Peters, knew. However, Martin develops no argument to support this assertion. Regardless, Peters detailed the critical aspects of Martin's driving to Walrath, so the result here would be the same either way.

operator of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of the vehicle until completely passed by the overtaking vehicle." Martin contends his driving on the fog line is consistent with a driver complying with this statute. We are not persuaded.

¶13 First, an officer need not rule out innocent behavior to perform a traffic stop. ***Waldner***, 206 Wis. 2d at 59. Further, Martin was not merely driving on the right side of his lane; he was driving all over his lane, including onto and over the centerline. Also, when Martin's vehicle reached the fog line, he abruptly jerked his vehicle back toward the center of his lane. Peters' description of Martin's driving in no way resembles that of a driver being overtaken under WIS. STAT. § 346.07(3).

By the Court.—Judgment affirmed.

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