COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1298-CR **Cir. Ct. No. 2007CT76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. STEKELBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 BRIDGE, J.[1] Michael Stekelberg appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense, and operating a motor vehicle with a prohibited alcohol concentration, second offense. Stekelberg

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

argues the circuit court erred when it denied his motion to suppress because the arresting officer lacked probable cause to make a traffic stop. We disagree and affirm the judgment.

BACKGROUND

¶2 On May 20, 2007, at approximately 1:00 a.m., Marquette County Deputy Sheriff Todd Neilsen observed both passenger wheels and approximately one-third of a vehicle driven by Stekelberg cross the white fog line on State Highway 22, south of Montello, and then return to its lane of traffic. Neilsen continued to follow the vehicle for another one and one-half miles and saw the same portion of the vehicle cross the fog line an additional three times in what he described as a gradual motion. Neilsen pulled Stekelberg's vehicle over based on what he stated was his belief that Stekelberg was operating the vehicle while impaired. Stekelberg was ultimately charged with operating a motor vehicle while intoxicated, second offense, and operating a motor vehicle with a prohibited alcohol concentration, second offense.

¶3 Stekelberg filed a motion to suppress, arguing the stop was unlawful because Neilsen did not have reasonable suspicion to believe Stekelberg was committing a crime, and thus the stop violated his constitutional guarantee against unreasonable search and seizure. The circuit court denied the motion. The court explained that the multiple times Stekelberg's vehicle crossed the fog line over the one and one-half mile distance provided a sufficient basis for Neilsen to suspect that Stekelberg was operating the vehicle while impaired. After his motion to suppress was denied, Stekelberg pled no contest to the charges and a judgment of conviction was entered by the court. Stekelberg appeals.

DISCUSSION

¶4 Under the Fourth Amendment, individuals are protected against unreasonable seizures, which includes their temporary detention during automobile stops by police. ***Whren v. United States***, 517 U.S. 806, 809-810 (1996). This constitutional guarantee is not violated if a stop of an individual is based on an officer's reasonable suspicion that the individual has committed, is committing, or is about to commit a crime. ***Terry v. Ohio***, 392 U.S. 1, 26 (1968). The law is clear that to preserve this constitutional guarantee, an officer's reasonable suspicion must be based on specific, articulable facts, and those inferences that may be reasonably drawn from those facts, in light of the totality of the circumstances. ***Id***. at 21-22; ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634.

¶5 Whether Neilsen had reasonable suspicion to stop Stekelberg presents a question of law. ***Post***, 301 Wis. 2d 1, ¶8. Our standard of review of this question is two-pronged. We first review the circuit court's findings of historical fact and uphold them unless they are clearly erroneous. ***Id.*** We then determine independently whether those facts violated Stekelberg's constitutional guarantee against unreasonable search and seizure. ***Id.*** Here, the facts are undisputed, and thus only questions of law are before us. *See* ***id.***

¶6 Stekelberg contends that his motion to suppress should have been granted by the circuit court because: (1) swerving outside the fog line is not an illegal activity and does not form a basis for reasonable suspicion; and (2) swerving outside the fog line alone was insufficient to constitute reasonable suspicion to stop his vehicle. In ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), our supreme court expressly rejected an argument that lawful conduct

cannot form the basis for reasonable suspicion. The court explained that if such conduct could not, "there could never be investigative stops unless there [were] simultaneously sufficient grounds to make an arrest." ***Id***. at 59. Such a requirement would render an officer's ability to make an investigatory stop based on reasonable suspicion superfluous. Accordingly, the legality or illegality of Stekelberg's actions is immaterial to our reasonable suspicion analysis. We therefore reject Stekelberg's first argument and turn to his second argument.

¶7 In ***Post***, 301 Wis. 2d 1, ¶14, the supreme court declined to adopt a bright-line rule that repeated weaving within a single lane alone gives rise to reasonable suspicion. Instead, the court held that the determination must be based on the totality of the circumstances which may include, for example, whether the "'weaving' is minimal or happens very few times over a great distance." ***Id.***, ¶19. Here, Neilsen observed a third of Stekelberg's vehicle cross the fog line four times over the span of one and one-half miles. We conclude that this pronounced deviation on four instances within a distance of a mile and a half late at night near bar time is adequate to give rise to probable cause to believe that the driver is driving under the influence of intoxicants, and justifies a stop for further investigation. We therefore affirm the denial of Stekelberg's motion to suppress and the judgment of conviction.

By the Court.—Judgment affirmed.

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