

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 4, 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. 2008AP2464-CR

Cir. Ct. No. 2008CT416

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. FERRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
STEVEN G. BAUER, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Michael Ferrell appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). He contends the arresting officer did

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.

not have probable cause to initiate the traffic stop of his vehicle because the officer did not have reason to believe he had violated a state statute or local ordinance. We disagree and affirm.

BACKGROUND

¶2 Ferrell was arrested for operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration in violation of § 346.63(1)(b). Following his arrest, Ferrell moved to suppress evidence which arose from the traffic stop on the basis that the arresting officer lacked reasonable suspicion to conduct the stop.

¶3 At the suppression hearing, the arresting officer testified that on May 19, 2008, at approximately 9:43 p.m., he observed Ferrell's eastbound vehicle make a right-hand turn onto a southbound street at what appeared to be an unsafe speed, and accelerate while doing so. The officer testified that while Ferrell's vehicle was traveling southbound over a distance of three blocks, it twice crossed the painted solid center line by approximately one foot before returning to its lane of traffic. The officer also observed the vehicle weave within its lane of traffic in what the officer described as a "serpentine type style." The officer testified that based on the fact that Ferrell's vehicle twice crossed the center line, he stopped Ferrell's vehicle.

¶4 At the hearing, Ferrell argued that the officer lacked reasonable suspicion to believe that he was violating a state law or city ordinance. The State responded that the traffic stop was reasonable because the officer had probable cause to believe a traffic violation—driving left of the center line—had occurred. The court agreed with the State and denied Ferrell's motion. The court stated that

while Morgan's turn and weaving within the lane of traffic was not illegal, crossing the center line was a violation of WIS. STAT. § 346.09² and thus provided a reasonable basis to stop him.

¶5 Ferrell subsequently plead guilty to operating a motor vehicle while under the influence of an intoxicant, second offense. The court accepted the plea and entered judgment accordingly. Morgan appeals.

STANDARD OF REVIEW

¶6 Whether a traffic stop is reasonable is a question of constitutional fact, which presents a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We will uphold the circuit court's factual findings unless they are clearly erroneous, but will independently review the application of those facts to constitutional principles. *Id.*

DISCUSSION

¶7 At issue in this case is whether the traffic stop violated Ferrell's constitutional rights. For an officer to initiate a traffic stop without violating an individual's Fourth Amendment rights, the officer must have probable cause, otherwise described in this context as reasonable suspicion, to believe that the individual is committing, is about to commit, or has committed a crime. *State v. Popke*, 2009 WI 37, ¶¶13-14, No. 08-446-CR; *Post*, 301 Wis. 2d 1, ¶11 n.3. This

² There was some uncertainty at the hearing as to which statute may have been violated by the act of crossing the center line. The circuit court ultimately relied on WIS. STAT. § 346.09. As we discuss below, we conclude that crossing the center line violates WIS. STAT. § 346.05 and affirm on that basis. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on grounds different than those relied on by the circuit court).

requires that at the time of the stop, the officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *Post*, 301 Wis. 2d 1, ¶10 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). “[W]hat constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶8 The officer pulled Ferrell over because he believed Ferrell violated a traffic law when he crossed the center line on two separate occasions. Ferrell argues that briefly crossing the center line does not constitute operating a motor vehicle on the left side of the road contrary to WIS. STAT. § 346.05,³ which

³ WISCONSIN STAT. § 346.05(1) provides:

(1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway, except:

(a) When making an approach for a left turn under circumstances in which the rules relating to left turns require driving on the left half of the roadway; or

(b) When overtaking and passing under circumstances in which the rules relating to overtaking and passing permit or require driving on the left half of the roadway; or

(c) When the right half of the roadway is closed to traffic while under construction or repair; or

(d) When overtaking and passing pedestrians, animals or obstructions on the right half of the roadway; or

(e) When driving in a particular lane in accordance with signs or markers designating such lane for traffic moving in a particular direction or at designated speeds; or

(continued)

requires motorists to operate “on the right half of the roadway”; WIS. STAT. § 346.09(1),⁴ which provides that motorists shall not drive left of the center lane when overtaking or passing another vehicle unless it is safe to do so; or § 346.09(3),⁵ which prohibits motorists from passing in a no-passing zone. Ferrell also argues that he did not violate § 346.09(1) when he crossed the center line because at the time he was not attempting to pass another vehicle, and that WIS. STAT. § 346.13⁶ is not applicable because there was no oncoming traffic at the

(f) When the roadway has been designated and posted for one-way traffic, subject, however, to the rule stated in sub. (3) relative to slow moving vehicles.

⁴ WISCONSIN STAT. § 346.09(1) provides,

Upon any roadway where traffic is permitted to move in both directions simultaneously, the operator of a vehicle shall not drive to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be done in safety.

⁵ WISCONSIN STAT. § 346.09(3) provides,

The operator of a vehicle shall not drive on the left side of the center of a roadway on any portion thereof which has been designated a no-passing zone, either by signs or by a yellow unbroken line on the pavement on the right-hand side of and adjacent to the center line of the roadway, provided such signs or lines would be clearly visible to an ordinarily observant person.

⁶ WISCONSIN STAT. § 346.13 provides,

Whenever any roadway has been divided into 2 or more clearly indicated lanes, including those roadways divided into lanes ... the following rules, in addition to all others consistent with this section, apply:

(1) The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.

(continued)

time and, therefore, the safety of others was not at risk. The State responds that crossing the center line was contrary to both §§ 346.05 and 346.09(3) and, therefore, the officer had a reasonable suspicion to believe Ferrell had committed a crime.

¶9 In *Popke*, a case decided during the pendency of this appeal, the supreme court concluded that crossing the center line, even briefly, constitutes operating left of center within the meaning of WIS. STAT. § 346.05, and provides a reasonable basis for conducting a traffic stop when the exceptions to § 346.05(a)-(f) do not apply. *Popke*, 2009 WI 37, ¶¶17-18. The defendant in *Popke* argued that by only “momentarily” crossing the center line, he was not “driving” on the wrong side of the road. *Id.*, ¶18. The supreme court disagreed, concluding that the defendant’s action in crossing the centerline was consistent with the definition of “[d]rive” set forth in WIS. STAT. § 346.63(3)(a). *Id.*

¶10 By crossing the center line of the road, Ferrell drove on the left side of the road contrary to WIS. STAT. § 346.05. *See id.*, ¶¶17-18. Ferrell does not contend, nor do the facts indicate, that any of the exceptions to § 346.05 apply. We therefore conclude that the officer had reasonable grounds to believe Ferrell

....

(3) Notwithstanding sub. (2), when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.

had violated a traffic law⁷ and Ferrell's motion to suppress was properly denied. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

⁷ Because we conclude that probable cause existed to stop Ferrell's vehicle because he crossed the center line contrary to WIS. STAT. § 346.05, we do not address whether crossing the center line was contrary to WIS. STAT. § 346.09(1) or (3), or WIS. STAT. § 346.13. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point decides the appeal, we need not address other issues raised).

