

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 2, 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. 2008AP1956**  
**STATE OF WISCONSIN**

Cir. Ct. Nos. 2007TR2281  
2007TR2282

**IN COURT OF APPEALS  
DISTRICT IV**

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**COUNTY OF CRAWFORD,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK A. LESTER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Crawford County:  
GEORGE S. CURRY, Judge. *Affirmed.*

¶1 BRIDGE, J.<sup>1</sup> Mark Lester appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, first offense, contrary to WIS. STAT. § 346.63(1)(a). Lester contends the officer making

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

the investigatory stop did not have reasonable suspicion to stop his vehicle, and also contends that the officer did not have probable cause to arrest him. We disagree and affirm.

### **BACKGROUND**

¶2 The following facts are undisputed. At approximately 10:15 p.m. on August 8, 2007, Phil Baumgartner, a deputy sheriff with the Crawford County Sheriff's Department, observed a vehicle driven by Lester. Baumgartner estimated that Lester's vehicle was traveling between fifty-five and sixty miles per hour, and Baumgartner observed the vehicle cross the white fog line approximately six times over a two mile distance. Baumgartner testified that the majority of the times the vehicle crossed the fog line, it did so by one to two feet, and that it twice continued to travel over the line for between three to five seconds. Baumgartner also observed the left side of Lester's vehicle drive onto, but did not cross over, the double yellow centerline for approximately one to two seconds.

¶3 Based on these observations, Baumgartner stopped Lester's vehicle. When Baumgartner approached Lester, he observed that Lester's eyes were bloodshot and that he smelled of intoxicants. Baumgartner asked Lester if he had been drinking and Lester replied that he'd "had a couple."

¶4 Baumgartner asked Lester to submit to field sobriety tests, which he agreed to do. The first test administered was the horizontal gaze nystagmus test (HGN). Baumgartner testified that rather than follow Baumgartner's pen with his eyes, Lester looked over Baumgartner's shoulder the entire time Baumgartner was moving the pen. The second test administered by Baumgartner was the alphabet test, which required a recitation of the alphabet from A to Z. On Lester's first attempt, he was able to recite all the letters of the alphabet until he reached the

letter J, at which point he stopped. Lester was given a second chance to fully recite the alphabet, but stopped after reaching the letter P. The final test administered by Baumgartner was the “9 step walk and turn” test. Baumgartner testified that in performing this test, Lester stepped out of the instructional stance, failed to step heel to toe as directed, stepped off the line, and took an incorrect number of steps. After Lester completed the field sobriety tests, he was placed under arrest.

¶5 Lester moved to suppress evidence which was obtained as a result of his detention and arrest. At the hearing on the motion, he claimed that his arrest was unlawful because Baumgartner did not have reasonable suspicion to stop his vehicle and because Baumgartner did not have probable cause to arrest him. The circuit court rejected both of Lester’s contentions. The court acknowledged that when Baumgartner stopped Lester, a traffic violation had not yet occurred. However, the court concluded that Lester’s erratic driving would have indicated to a reasonable officer that a traffic law violation was about to, or was likely to, occur and, therefore, provided Baumgartner a reasonable basis for the stop.

¶6 Following the denial of Lester’s suppression motion, the matter was tried to the court on stipulated facts. Lester was ultimately found guilty of operating a motor vehicle while under the influence of an intoxicant. On its own motion, the court dismissed the charge of operating a motor vehicle with a prohibited alcohol concentration. The court entered judgment accordingly. Lester appeals.

## DISCUSSION

¶7 Lester challenges his conviction on two grounds: Baumgartner did not have reasonable suspicion to stop his vehicle, and Baumgartner did not have probable cause for his arrest. We address each contention below.

### REASONABLE SUSPICION TO STOP

¶8 Whether a traffic stop is reasonable is a question of constitutional fact, which presents a mixed question of fact and law. *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 principals. *Id.*

¶9 An officer has a reasonable suspicion if he or she is “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).

¶10 It is undisputed that Baumgartner observed Lester, over a two mile distance, cross the white fog line six times and drive once onto the center line. Baumgartner testified that after making these observations, he became concerned about Lester’s driving and therefore stopped the vehicle. The State did not contend before the circuit court, and does not contend now, that Lester’s driving deviations were either crimes or non-criminal traffic violations, or that

Baumgartner pulled Lester's vehicle over because he believed they were. Thus, the investigatory stop of Lester was not based on Baumgartner's reasonable suspicion that Lester was committing or had committed a crime or a non-criminal traffic violation. Rather, as the circuit court found, the stop was based on Baumgartner's suspicion that a traffic law violation was *about* to be committed.<sup>2</sup>

¶11 Lester argues that even though an investigatory stop may be based on an officer's reasonable suspicion of future criminal activity, Wisconsin case law does not authorize an investigatory stop based on an officer's suspicion of a future non-criminal traffic violation. He claims that in the context of non-criminal traffic violations, the officer's suspicion may be based only on his or her belief that the violation has already been committed or is presently being committed. He further argues that because the stop in this case was based on a suspicion of future non-criminal traffic violations, Baumgartner did not have sufficient reasonable suspicion to stop his vehicle. The State disagrees, arguing that the conduct forming the basis for an investigatory stop need only be suspicious, not necessarily illegal.

¶12 Lester's argument relies on language contained in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). In *Renz* the supreme court stated that an investigative stop for a traffic violation may be made if the officer reasonably suspects that the person "is violating the non-criminal traffic laws." *Renz*, 231 Wis. 2d at 310. Lester construes the supreme court's failure to include language in *Renz* that an investigatory stop may also be made if an officer suspects future non-criminal traffic law violations, as a pronouncement

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<sup>2</sup> This finding is not disputed by the parties.

that investigatory stops may not be based on a suspicion that the driver of a vehicle is about to commit a non-criminal traffic violation. However, the supreme court has recently made clear that an officer may conduct an investigatory traffic stop “when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation *has been or will be committed.*” *State v. Popke*, 2009 WI 37, ¶23, 765 N.W.2d 569 (emphasis added). Accordingly, we reject Lester’s construction of the supreme court’s statement in *Renz* as indicating that investigatory traffic stops may not be made based on a reasonable suspicion of future non-criminal traffic violations. We thus conclude that Baumgartner’s suspicion that Lester was about to commit a traffic violation provided a sufficient basis to stop Lester’s vehicle.<sup>3</sup>

#### PROBABLE CAUSE TO ARREST

¶13 A police officer has probable cause to arrest an individual when the totality of the circumstances within the officer’s knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant probably committed the crime. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause is measured by the totality of the circumstances within the arresting officer’s knowledge at the time of arrest. *Id.* In reviewing a circuit court’s determination with respect to whether probable cause existed for an arrest, we will uphold the court’s factual findings unless they are clearly erroneous, but

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<sup>3</sup> Because we conclude that Baumgartner had reasonable suspicion to stop Lester’s vehicle based on Baumgartner’s suspicion that Lester was about to commit a traffic violation, we do not address Lester’s remaining arguments, namely whether the stop was based on Baumgartner’s mistaken view of the law and whether Baumgartner had reasonable suspicion to believe Lester was operating the motor vehicle while under the influence of an intoxicant. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

review de novo whether those facts satisfy the standard of probable cause. *Renz*, 231 Wis. 2d at 316.

¶14 Lester contends that Baumgartner did not have sufficient probable cause to arrest him for operating while under the influence of an intoxicant. This contention is largely based upon his claim that the results of all three of his field sobriety tests were unreliable.

¶15 Lester first argues that the HGN test was not properly administered, and therefore not indicative of intoxication, because Baumgartner did not have Lester remove his eyeglasses during the test, which Baumgartner was trained to do, and because Lester was facing the flashing lights of Baumgartner's patrol vehicle during the test. The circuit court acknowledged that the test was not properly administered. However, the court found that Lester's failure to pass the test was not attributable to defects with the test itself, but rather was attributable to Lester's refusal to participate in the test. Other than a reference to the fact that Lester exhibited equal tracking when checked by Baumgartner prior to administering the actual HGN test, Lester does not provide any argument which would persuade us that the court's finding in this regard was clearly erroneous.

¶16 Lester also argues that the ABC test and the walk and turn test are unreliable and, therefore, not indicative of intoxication. With regard to the ABC test, Lester takes issue with the fact that Baumgartner did not receive any formal training to administer the test and there are no standardized clues for the test. With regard to the walk and turn test, Lester's primary point of contention is the State's failure to present evidence regarding standards as to how his performance was to be evaluated or what conclusions Baumgartner was to have drawn from Lester's performance. Lester does not provide any legal authority to support his

claims of the unreliability of these testing instruments. Further, Lester's arrest was not based on the results of these two tests standing alone. In addition to the ABC test and the walk and turn test, Lester's arrest was also based on Baumgartner's observations of Lester's erratic driving, his bloodshot eyes, the strong odor of intoxicants, and Lester's admission to drinking prior to driving, coupled with the results of the HGN test. We conclude that the totality of these circumstances would lead a reasonable officer to believe that Lester was driving while intoxicated.

*By the Court.*—Judgment affirmed

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



