COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2769-CR **Cir. Ct. No. 2007CT189**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY L. REIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Mary L. Reis appeals her conviction for operating a vehicle while intoxicated, second offense, in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 753.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§ 346.63(1)(a) on the grounds that the state trooper did not have reasonable suspicion to stop her vehicle. Reis was stopped after a trooper observed her car weaving within her travel lane. To support her appeal, Reis relies on ***State v. Post***, 2007 WI 60, ¶¶26-27, 301 Wis. 2d 1, 733 N.W.2d 634, in which our supreme court rejected a proposed rule that weaving within a single lane, on its own, gives rise to reasonable suspicion. Reis argues that because she was only weaving within her travel lane, her case does not meet the requirements of ***Post***. In response to Reis, we cite ***State v. Popke***, 2009 WI 37, ¶27, __ Wis. 2d __, 765 N.W.2d 569, where our supreme court recently addressed the method for assessing reasonable suspicion. In ***Popke***, the court reiterated that the totality of the circumstances test based on the unique facts presented in each case, and not a comparison to ***Post***, remains the sole procedure for finding reasonable suspicion for a stop. ***Popke***, 2009 WI 37, ¶27. We conclude that, under the totality of the circumstances, the trooper had reasonable suspicion to stop Reis' vehicle and affirm.

¶2 To adequately address the totality of the circumstances it is necessary to have a firm grasp of the facts. On February 9, 2007, a Wisconsin state patrol trooper was following a Chevy Trailblazer traveling north on State Highway 147 toward the Village of Mishicot around 6:40 on a Friday evening. The vehicle was driving at the forty-five mile per hour speed limit. In the span of approximately a quarter of a mile, the trooper observed the vehicle weave four times in a fluid "s-curve" pattern from within a foot of the fog line to approximately six inches off the centerline.[2]

[2] The fog line is the white line that defines the outer lateral lines of the roadway.

¶3 The travel lane was twelve feet wide from the fog line to the center line. The vehicle was approximately six feet three inches wide. When the vehicle moved right to left within the travel lane and back again, it made a lateral movement of approximately four feet three inches, four separate times. After the four weaving motions, the speed limit reduced to twenty-five miles per hour and the car slowed to the correct speed limit but continued to weave. The trooper stopped counting the number of weaves at this point to search for a safe place to pull the vehicle over.

¶4 Once the trooper stopped the vehicle, he questioned Reis, who admitted to consuming a couple glasses of wine, beginning at around five o'clock that evening. The trooper asked Reis to exit her car and she appeared unsteady upon exiting the vehicle. Reis subsequently failed her field sobriety test and the trooper placed Reis under arrest. Once in custody, Reis submitted to a blood test, which indicated a BAC of .126.

¶5 The State charged Reis with operating a vehicle while intoxicated and operating a vehicle with a prohibited alcohol concentration, second offense, in violation of WIS. STAT. § 346.63(1)(a) and (b), respectively. After being charged, Reis filed a motion to suppress all the evidence based upon lack of reasonable suspicion for stopping her vehicle.

¶6 At the motion hearing, the trooper testified about the facts of the stop as discussed above. The trooper also noted that he did not observe any other factors such as strong winds, poor road conditions, or vehicle problems that would explain the "s-curve" pattern driving.

¶7 The trial court did not make a decision right away, but ordered post-hearing briefs. In her brief, Reis argued that the evidence for her stop was

distinguishable from ***Post*** and therefore was not significant enough to support a reasonable suspicion for stopping her. *See* ***Post***, 301 Wis. 2d 1, ¶26. Specifically, Reis asserted that her lane deviation was far less severe than that of the driver in ***Post*** because the travel lane was approximately twenty-two to twenty-four feet wide in ***Post*** and the driver's weaving motion occurred in a ten-foot lateral progression as opposed to Reis' four-foot weave. *See* ***id.***, ¶¶3, 5. Reis also stated that the weaving motion in ***Post*** was more noticeable and that the officer had a greater degree of objective comparison of the weaving because there was another car driving in a normal pattern concurrently with the weaving car. *See* ***id.***, ¶¶4, 31. Finally, Reis pointed out that the time of the stop in ***Post***, 9:30 p.m., was closer to "bar time" and therefore was more significant in alerting the officer that the driver may have been intoxicated. *See* ***id.***, ¶36.

¶8 The trial court found that the trooper was a reliable witness because of his traffic enforcement experience. This is supported by the record. In addition to academy training, the trooper had spent almost eight years working in traffic enforcement when he stopped Reis. As part of his duties, the trooper regularly stopped and arrested intoxicated drivers that exhibited the same "s-curve" driving displayed by Reis. The trooper estimated that the majority of these stops occurred on Fridays and Saturdays. Lastly, as noted by the trial court, the trooper also testified that Friday evenings were a popular time for people in the area to attend Friday night fish fries, and that very often the consumption of alcohol occurred at these events.

¶9 The trial court then found that, under the totality of the circumstances, the trooper had reasonable suspicion for stopping Reis and denied the motion for suppression of the evidence. As a result, Reis pled no contest to the

charges against her, and now appeals the conviction that resulted from that plea on the same theory proposed in her motion brief.

¶10 Whether an officer has reasonable suspicion to stop a vehicle is a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. The inquiry is a two-step process, which we begin by reviewing the circuit court's findings of historical fact under the "clearly erroneous" standard. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. Secondly, we review the application of the historical facts to the constitutional issue de novo. ***Id.***, ¶19; ***State v. Payano-Roman***, 2006 WI 47, ¶16, 290 Wis. 2d 380, 714 N.W.2d 548.

¶11 Stops are governed by constitutional principles in the Fourth Amendment to the United States Constitution that protect citizens from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; WIS. CONST. art I, § 11. In ***Terry v. Ohio***, 392 U.S. 1, 27 (1968), the Supreme Court outlined the test for a reasonable stop, more commonly referred to as the totality of the circumstances test. *See also* WIS. STAT. § 968.24 (codifying the ***Terry*** standard in Wisconsin). ***Terry*** established that an officer can conduct a legal stop, including traffic stops, without probable cause if they can point to "specific and articulable facts" which, taken together, warrant the stop. ***Terry***, 392 U.S. at 21; *see also* ***Post***, 301 Wis. 2d 1, ¶¶10-13 (stating that reasonableness of the stop is assessed based on the totality of the circumstances). A stop is warranted where a reasonable police officer, in light of his or her training and experience, suspects that an individual has committed, was committing, or was about to commit a crime. ***Post***, 301 Wis. 2d 1, ¶13 (citing ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990)).

¶12 In Wisconsin, it is a crime to operate a vehicle while under the influence of an intoxicant. WIS. STAT. § 346.63(1)(a). The phrase "under the influence of an intoxicant" is illustrated by a driver's inability to safely control his or her vehicle. WIS JI—CRIMINAL 2600, cmt. VIII A. This is not to say that the driver must demonstrate specific acts of unsafe driving, but simply that the driver demonstrates poor management and control of the vehicle. *See* WIS JI—CRIMINAL 2600, cmt. VIII A.

¶13 In ***Popke***, the defendant proposed Reis' same argument, that the officer's observations were too few and too vague when compared with ***Post*** to establish that the officer had reasonable suspicion to make a stop. *See* ***Popke***, 2009 WI 37, ¶27. The facts of ***Popke*** are simple enough. The officer observed a vehicle driving with three-quarters of the vehicle to the left of the center of the road at 1:30 a.m. ***Id.***, ¶26. The car then moved back into its proper lane, but by over-correcting, almost hit the curb, and then faded back to the middle of the road and almost hit the median, over a distance of one block, at which point the officer stopped the car. ***Id.*** The supreme court found that under the totality of the circumstances, these straightforward facts gave rise to a reasonable suspicion that the defendant was driving while intoxicated. ***Id.***

¶14 The critical portion of the ***Popke*** opinion was the supreme court's clarification of the defendant's reliance on the facts of ***Post***. ***Popke***, 2009 WI 37, ¶27. The court reiterated that the totality of the circumstances test for the defendant's *particular* case was still the appropriate method for finding that the officer had reasonable suspicion that the driver was intoxicated. *See* ***id.*** (stating that "potential inadequacies set forth by the defendant do not undermine the totality of the other facts that support reasonable suspicion"). The supreme court's reiteration of the importance of the totality of the circumstances test implicitly

confirmed that the facts in ***Post*** are not the litmus test for what does and does not constitute reasonable suspicion. *See* ***Popke***, 2009 WI 37, ¶27.

¶15 Turning to the facts of our own particular case, Reis was driving in a discernible "s-curve" pattern that attracted the attention of a State trooper experienced in identifying drunk drivers. The trooper observed this distinct pattern for not just one block as in ***Popke***, or even two blocks as in ***Post***, but over a quarter mile of driving, leaving little doubt that the driver was not merely momentarily inattentive. ***Popke***, 2009 WI 37, ¶5; *see* ***Post***, 301 Wis. 2d 1, ¶6. The officer was driving behind the vehicle in a position to easily observe its operation and had a clear view of the overt weaving pattern and noticed no other external factor that could affect Reis' driving. Further, while the time of night may not be of such significance as the ubiquitous "bar time," the fact that the local tradition of a Friday night fish fry, which typically includes the consumption of alcohol, was well-known to the state trooper with eight years of experience patrolling the area, does lend some support to the overall inference that Reis was driving while intoxicated. *See* ***Post***, 301 Wis. 2d 1, ¶36. Therefore, under the totality of the circumstances test as emphasized in ***Popke***, the trooper had reasonable suspicion that Reis was operating a vehicle while under the influence of an intoxicant.

¶16 As a result, we affirm the trial court's denial of her suppression motion, and the judgment of the conviction stands.

By the Court.—Judgment affirmed.

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

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