

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 13, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2008AP3120**

**Cir. Ct. Nos. 2006TR23707  
2006TR23708**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DAMIAN A. COX,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
STEVEN D. EBERT, Judge. *Affirmed.*

¶1 LUNDSTEN, J.<sup>1</sup> Damian Cox appeals a judgment convicting him of a first offense for drunk driving. The dispositive issue is whether the officer

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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.

had reasonable suspicion to stop Cox for impaired driving. I conclude that he did, and affirm the judgment.

### ***Background***

¶2 The relevant background facts derive largely from the officer's testimony at the hearing on Cox's motion to suppress. The circuit court credited this testimony, and Cox did not testify.

¶3 At approximately 1:17 a.m., on December 16, 2006, the officer was traveling in the City of Madison on High Crossing Boulevard, a four-lane divided highway. The roadway was well lit. The officer observed a vehicle ahead of him in the left lane drift to the right across the line that divides the left and right lanes, then drift back into the left lane. The vehicle was initially some distance ahead of the officer, but the officer soon closed the distance so that the officer's vehicle was within several car lengths of the suspect vehicle. In addition, the officer activated a digital video camera in his squad car.

¶4 As the officer caught up to the vehicle, he observed the vehicle drift to the left and touch the solid white stripe on the left edge of the roadway. As the vehicle negotiated a curve to the right, it drifted to the far left edge of the lane, then drifted back to the right just short of crossing into the right lane.

¶5 Shortly thereafter, the vehicle signaled and made a lane change into the right lane. According to the officer, the vehicle at that point crossed into a bike lane on the right, then made an abrupt movement back to the far left edge of the right-hand vehicle lane. The officer stated that the drifting into the bike lane was a "tire width," apparently meaning that the vehicle's right-side tires were just

over the line. The officer also stated that “at a maximum the tires crossed the line [for the bike lane].”

¶6 In general, the officer described the vehicle’s movements as “drifting,” by which the officer meant “slow gradual movements to one side or the other but maintaining within the lane .... It doesn’t actually cross out of the lane but it, it’s not maintaining a direct or very straight course of travel. It drifts from side to side.” Based on his training and experience, the officer associated this type of driving behavior with intoxicated or otherwise impaired driving. It is not the type of driving behavior that the officer saw of the general public on a daily basis.<sup>2</sup>

¶7 In addition to the officer’s testimony, the record contains a copy of video footage obtained from the digital video camera in the officer’s squad car. Cox introduced the video in an attempt to impeach the officer’s testimony or to demonstrate that the driving behaviors shown on the video were insufficient to constitute reasonable suspicion. The officer testified that the video did not fully capture nuances, distances, or the officer’s ability to see in the dark. The video was played in open court and received as evidence. It corroborated much of the officer’s testimony. The video also shows the driver of the vehicle failing to make a complete stop at a blinking red light immediately before the officer stopped the vehicle.

¶8 After stopping the vehicle, the officer identified the driver as Cox. Cox registered a 0.10 blood alcohol content, and the officer issued Cox citations

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<sup>2</sup> The officer in his testimony sometimes used the term “deviate” instead of “drift” to describe Cox’s driving behavior. It is apparent from the officer’s testimony that the officer was often using the terms interchangeably. For the sake of clarity and simplicity, I will use the term “drift” throughout this opinion.

for operating under the influence of an intoxicant and operating with a prohibited alcohol concentration.

¶9 Relying primarily on the officer’s testimony, and stating that the video was not the “best evidence of the [officer’s] observations,” the circuit court concluded that the officer possessed reasonable suspicion to initiate the traffic stop. Cox was subsequently convicted of a first drunk driving offense. Additional facts are referenced as needed below.

### *Discussion*

¶10 In reviewing a motion to suppress, this court defers to the circuit court’s fact findings and will not overturn those findings unless they are clearly erroneous. *State v. Dull*, 211 Wis. 2d 652, 655, 565 N.W.2d 575 (Ct. App. 1997). Whether the facts, as found, warrant suppression of the evidence, however, is reviewed *de novo*. *See id.*

¶11 A police officer may conduct a traffic stop when, under the totality of the circumstances, there are grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, \_\_\_ Wis. 2d \_\_\_, 765 N.W.2d 569. 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.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has violated, was violating, or is about to violate the law. *See id.*, ¶13. An officer’s “inchoate and unparticularized suspicion or hunch” is not enough. *Id.*, ¶10 (citation omitted).

¶12 Cox argues that the officer lacked reasonable suspicion to stop him. We disagree.

¶13 As described in the officer's testimony, Cox engaged in a series of back-and-forth drifting maneuvers, including instances in which Cox's vehicle at least touched lane demarcation lines. Moreover, this occurred at approximately 1:17 a.m., a time when there is a comparatively high likelihood that such behavior indicates impaired driving. In addition, as the State argued in the circuit court, and as the video from the officer's squad car camera plainly reveals, Cox failed to come to a full stop at a blinking red light moments before the officer initiated the stop. Taken together, these circumstances were sufficient for the officer to form a reasonable suspicion that Cox was driving while impaired.<sup>3</sup>

¶14 Cox points to *Post*, a case in which the supreme court deemed the facts a "close call," but concluded that there was reasonable suspicion. *See Post*, 301 Wis. 2d 1, ¶27. The most pertinent facts in *Post* were that the driver was weaving several times, approximately ten feet from right to left in a discernible S-pattern, over the course of two blocks; the street was a wide street with an unlined parking lane; it was approximately 9:30 p.m.; and the vehicle was initially "canted" such that the driver was driving at least partially in the unmarked parking lane. *Id.*, ¶¶3-5, 37.

¶15 Cox argues that the drifting here is less egregious than that in *Post* and that it occurred over a longer length of road. He argues that, if the drifting in

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<sup>3</sup> The officer initially testified that Cox stopped at the red light. After viewing the video in court, however, the officer agreed that the video appeared to show Cox failing to make a complete stop.

*Post* was a close call, the drifting here falls short of reasonable suspicion. Cox also argues that his drifting occurred on curves in the road and that such drifting is insufficient to show impaired driving or to otherwise differentiate impaired driving from typical, unimpaired driving.

¶16 I need not decide whether the drifting here was more or less extreme than that in *Post* or whether the type of drifting Cox engaged in would, by itself, be sufficient to constitute reasonable suspicion. As already indicated, Cox failed to make a complete stop at a red light in addition to engaging in the drifting described. This is a significant fact not present in *Post*. Moreover, the much later time of night in Cox's case adds more suspicion when compared to *Post*. I am satisfied that, under the totality of the facts, the officer could form a reasonable suspicion that Cox was driving impaired, even if much of Cox's drifting corresponded to curves in the road.

¶17 Cox also argues that the circuit court made an erroneous finding of fact. Specifically, Cox argues that it was erroneous for the circuit court to find, based on the officer's testimony, that Cox crossed into the bike lane and executed an abrupt movement back into the right-hand vehicle lane. Cox argues that it is clear in the video that his vehicle came close to or touched the line demarcating the bike lane but did not cross over it, and then merely drifted back toward the left. Cox also points out that, in the officer's recorded real-time narration on the video, the officer states: "here he goes now, off to the right edge of the lane, touching onto the fog line by the bike lane." In other words, the officer did not, at the time he was observing the driving behavior, state that Cox had crossed over the line.

¶18 I will assume, without deciding, that the circuit court's finding that Cox crossed into the bike lane and made an abrupt movement back into the right-

hand lane was clearly erroneous. Still, the remaining facts are sufficient to constitute reasonable suspicion supporting the stop.<sup>4</sup>

¶19 In sum, for the reasons stated, the circuit court judgment is affirmed.

*By the Court.*—Judgment affirmed.

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

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<sup>4</sup> Having viewed the video several times, I note that it is a poor substitute for observing Cox's vehicle in-person as the officer did. I agree with Cox that it appears from the video that Cox's vehicle at most touched the line, but did not cross into the bike lane, and did not make an abrupt movement back. Nonetheless, it is possible that the officer's testimony is more reliable than the video because the video did not fully capture nuances, distances, or the officer's ability to see in the dark. Simply put, the video does not depict the scene as clearly as the officer would have seen it.

