

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 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. 2008AP3136-CR

Cir. Ct. No. 2008CT564

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW S. LUX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Andrew S. Lux stands convicted of operating a vehicle while intoxicated, fourth offense. He contends that the reason for the stop,

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.

the officer's conclusion that he was driving at an unreasonable and imprudent speed, was unjustified since there was no objective evidence as to his speed, and the officer simply reacted based on what he considered to be excessive engine noise when accelerating from a stop. But evidence of speed is not the sine qua non of a violation. Rather, the question is whether the conduct observed and relied upon by the officer permitted him to reasonably suspect that Lux was driving in a reckless manner such that his speed was imprudent under the circumstances. The totality of the evidence shows that the officer had just this reasonable suspicion and the stop was proper. This court affirms.

¶2 At about 2:42 a.m. on Sunday, June 29, 2008, a Lake Geneva police officer observed a vehicle make a right turn in such a manner that its engine went into "high rev" and the turn was made at a "very fast speed." Rather than a normal turn, this turn was a "much sharper turn" at about "100 to 120 degrees.... [A]lmost a u-turn." The pavement was wet. The officer followed the vehicle and saw it stop and then accelerate quickly from the stop sign to another right-hand turn, just like the first turn. Although the vehicle went the speed limit upon reaching that speed, it was the acceleration in the right turn and up to the speed limit that concerned him. The officer considered the first turn especially unsafe because due to road construction there was a concrete block lying a couple of feet off the pavement. And after that turn there is a blind corner. The officer made the stop and the evidence garnered from that stop led to the operating while intoxicated arrest. Lux moved to suppress the evidence on the ground that there was no reasonable suspicion to make the stop. The trial court denied the motion and Lux then pled guilty. This appeal follows.

¶3 The grounds for the officer's stop was a suspected violation of WIS. STAT. § 346.57(2), which provides in pertinent part:

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of the vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.

¶4 Lux argues that he demonstrated due care and control in accord with the statute because he stopped at the stop signs, did not exceed the speed limit and did not collide with any object, person or vehicle. We disagree. The language of the statute reveals that compliance requires more than the absence of a collision and adherence to traffic signs. A collision is not a prerequisite nor is speeding. The mere fortuity that the defendant did not have a collision and the fact that speed limit was not exceeded do not, by themselves, demonstrate due care and reasonableness under the statute. Rather, it is necessary to prove that the speed was greater than that which is “reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing.” WIS. STAT. § 346.57(2); *see also* 52 Wis. Op. Att’y Gen. 30, 34 (1963).

¶5 In determining whether such facts are present in this case, we ask: 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. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). We hold that a reasonable police officer would conclude that Lux navigated the curve recklessly. Even though Lux might well have kept the speed at or below the limit while doing so, his *conduct* created an unreasonable risk of harm to himself by negotiating a high-rev, 100 or 120 degree right turn on wet pavement in an area near construction and with a blind corner coming up. And then, he repeated the conduct. We must be ever mindful that the test of reasonable suspicion is designed to balance the personal intrusion into a suspect’s privacy a stop generates

against the societal interests in solving crime and bringing offenders to justice. *State v. Guzy*, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987). Here, the intrusion was minimal compared to the very real possibility that the driver of the vehicle was engaging in conduct showing lack of judgment in controlling the vehicle and creating an unreasonable risk of harm. The stop was valid. The judgment is affirmed.

By the Court.—Judgment affirmed.

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

