

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 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. 2009AP960-CR

Cir. Ct. No. 2008CT1276

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE W. KOSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Eugene W. Kosky appeals from a judgment of conviction for operating with a prohibited alcohol concentration, fourth offense,

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.

contrary to WIS. STAT. § 346.63(1)(b). Kosky contends that the trial court erred in denying his motion to suppress evidence because the officer lacked probable cause for the stop and there was no reasonable suspicion that a traffic regulation had been violated. We conclude that at the time of the stop the officer had a reasonable suspicion that Kosky was violating a traffic regulation by operating a vehicle without functioning taillights. We therefore affirm the judgment.

¶2 The facts, as adduced at the hearing on Kosky's motion to suppress, were as follows. A city of Neenah police officer first observed Kosky's vehicle at 11:20 p.m. on Saturday, September 13, 2008. The officer, who was approximately 500 feet from Kosky's vehicle, noticed that she could not see his taillights. She sped up to get closer to him so she could see whether his taillights were on. After determining that the taillights were not on, the officer stopped the vehicle. Once the stop was initiated and the officer approached the vehicle, she noticed that the taillights were "possibly on." She noted that the taillights were "after-market," not from the manufacturer, and were not illuminated like a manufactured taillight would be. The officer testified to her understanding that the law requires a vehicle's taillights to be visible from the distance of 500 feet.

¶3 After hearing testimony from the officer, Kosky, and his passenger, the trial court determined that the officer had reasonable suspicion to temporarily detain Kosky's vehicle to ascertain whether its taillights were functioning properly. The trial court noted that the ambiguity as to whether Kosky's taillights were on is evident on the video recording of the stop. The video depicts two vehicles other than Kosky's, one "very much ahead" of his and one behind his, that clearly have visible taillights. The trial court observed, "It's very difficult to see whether or not the defendant had taillights. And according to the case law, it

is the essence of good police work for [the officer] to freeze the situation until she can sort out the ambiguity, whether or not it had taillights”

¶4 The trial court denied Kosky’s motion to suppress, and he subsequently pled guilty to operating with a prohibited blood alcohol concentration, fourth offense. Kosky now appeals the trial court’s denial of his motion to suppress.

¶5 The temporary detention of individuals during a traffic stop constitutes a seizure of persons within the meaning of the Fourth Amendment. *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). An officer may perform an investigative stop if the officer reasonably suspects a person is violating a noncriminal traffic law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (citing *State v. Griffin*, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994)); *see also State v. Colstad*, 2003 WI App 25, ¶13, 260 Wis. 2d 406, 659 N.W.2d 394 (investigatory stop was proper if there was reasonable suspicion to believe defendant had violated a traffic ordinance). “Reasonable suspicion is based upon specific and articulable facts that together with reasonable inferences therefrom, reasonably warrant a suspicion that an offense has occurred or will occur.” *State v. Longcore*, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)), *aff’d*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. While reasonable suspicion is insufficient to support an arrest or search, it permits investigation. *Longcore*, 226 Wis. 2d at 8.

¶6 Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold the trial court’s findings of fact unless

clearly erroneous, WIS. STAT. § 805.17(2), but we review de novo whether those facts meet the constitutional standard. *Williams*, 241 Wis. 2d 631, ¶18.

¶7 Kosky presents the issue on appeal as: “Was there a taillight violation to support the reasonable suspicion that a taillight violation had occurred?” Kosky contends that the answer must be “no” because WIS. STAT. § 347.13 requires only that a vehicle have one red taillight which is plainly visible from a distance of 500 feet and the video of the stop illustrates that his taillights were visible but not as bright as those of surrounding vehicles. We disagree.

¶8 Here, the officer observed what she believed to be a vehicle operating without taillights in violation of WIS. STAT. § 347.13(1). The trial court’s review of the videotape recording supports the reasonableness of this inference—the trial court stated:

Based on the videotape information, it looks like this car did not have taillights on.

....

[I]f I’m a police officer and I can’t see taillights but I can see the one in front of him and the one in back of him, the taillights, I’m going to preserve the status quo, make the stop, and determine whether or not there has been a crime or not.

While Kosky argues that the trial court’s findings are clearly erroneous, our review of the video confirms that the taillights failed to “emit[] a red light plainly visible from a distance of 500 feet to the rear,” *see* WIS. STAT. § 347.13(1), or any light at all.² Further, the video belies Kosky’s contention that the other vehicles on the road had more visible taillights because they were braking.

² Kosky conceded as much when questioned by the trial court:

(continued)

¶9 Based on the officer's testimony and the trial court's findings, we conclude that the officer had reasonable suspicion to initiate a stop of Kosky's vehicle and, therefore, the stop of Kosky's vehicle was legal. We uphold the trial court's denial of the motion to suppress and affirm the judgment.

By the Court.—Judgment affirmed.

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

[Court]: Sir, I want you to take a look at my computer screen [playing video].... You can see the taillights of the first car on the screen?

....

[Kosky]: Yes.

[Court]: Can you see the taillights on the second car on the screen?

[Kosky]: Just maybe slightly.

[Court]: That would be your vehicle, and then there's a vehicle in front of yours, correct?

[Kosky]: Yes.

[Court]: Can you see the taillights on that one?

[Kosky]: Yes, I can.

[Court]: You can clearly see taillights on two vehicles but not the third, which would be the middle one, correct?

[Kosky]: Yes.

[Court]: And that would be your vehicle, correct?

[Kosky]: Yes.

