COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1407-CR **Cir. Ct. No. 2006CT2319**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEON R. MCQUEEN,

DEFENDANT-APPELLANT.

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

¶1 DYKMAN, P.J.[1] Leon R. McQueen appeals from a judgment convicting him of operating a motor vehicle while under the influence of an

[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.

intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a). McQueen argues that the trial court erred in denying his motion to suppress the evidence obtained during the traffic stop of his vehicle. He contends that the stop violated his constitutional rights because the police lacked reasonable suspicion to conduct the traffic stop. We conclude that the facts establish that the police had reasonable suspicion to conduct the stop, and therefore affirm.

Background

¶2 The following undisputed facts are taken from the motion hearing testimony. Sun Prairie Police Officers James Rademacher and Todd Lukins were on duty on August 11, 2006, when they received information from dispatch regarding a possibly impaired driver. Lukens had been a police officer for five years, and Rademacher was a probationary officer undergoing field training. Lukens was serving as a field training officer for Rademacher, who was in the last phase of his field training, known as the "shadow phase."

¶3 At 1:48 a.m., Lukens and Rademacher received information from dispatch that there was a caller on the phone following a vehicle and the caller "believed the driver was possibly impaired." Dispatch relayed that the caller had provided the description of his or her own vehicle, the description of the suspect vehicle and its license plate number, the vehicles' location and their direction of travel.

¶4 Lukens and Rademacher then proceeded to the described area to look for the suspect vehicle. Dispatch continued to relay updates as to the vehicles' location as they were reported by the caller. When Lukens and Rademacher arrived in the described area, they spotted the two vehicles, and the

caller's vehicle pulled over and stopped. The officers continued following the suspect vehicle, which was driven by McQueen.

¶5 Lukens and Rademacher followed McQueen for approximately thirty seconds. During that time, they observed McQueen's vehicle drift back and forth in its lane and cross the fog line.[2] Lukens believed McQueen's driving was unusual and displayed "clues or indicators" that officers "use to assess if somebody might be impaired or intoxicated." The officers then initiated a traffic stop and made contact with McQueen.[3] Based on the information the officers gathered during the traffic stop, they arrested McQueen for driving while under the influence of an intoxicant. After the trial court denied McQueen's motion to suppress the evidence obtained during the traffic stop, McQueen pled no contest and the court entered a judgment convicting him of driving while under the influence of an intoxicant, third offense. McQueen appeals.

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[2] Rademacher testified: "I observed the vehicle swerve in its lane and it crossed the fog line." On cross-examination, he clarified that he had not separately mentioned swerving in his police report because: "I guess I indicated swerving to mean his motion from, as I indicated in my report, 12 inches from the centerline to proceeding across the fog line." Lukens testified: "[W]e could observe the vehicle drift back and forth within its lane. Also observed the vehicle cross the fog line." On cross-examination, Lukens testified that he was not "positive" as to the number of times he viewed a "change of position within the lane," but that it was "[t]wo to three times."

[3] Rademacher and Lukens testified that after they stopped McQueen, they were provided additional information regarding the caller. Rademacher testified that while he was running McQueen's driver's license, "another officer who had spoken with the witness on the radio [informed Lukens] that the complainants had observed Mr. McQueen stumbling getting in and out of his vehicle," and that the vehicle "did cross the fog line on the right side a couple of times." Lukens testified that after the stop but before they performed the field sobriety tests, they learned that another officer "had met with the complainants, who were willing to make written statements. There w[ere] two of them, and they had advised us before Officer Rademacher even began field sobriety that they had seen the subject stumbling before getting into the driver's seat of his vehicle and that they had seen him driving recklessly and crossing fog lines and that while he was driving."

Standard of Review

¶6 Whether evidence obtained during an investigative traffic stop must be suppressed because the stop was unconstitutional presents a question of constitutional fact. *See* ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Our standard of review involves two steps: first, we review the trial court's findings of historical fact under the clearly erroneous standard; then, we review whether those facts meet the constitutional standard de novo. ***Id.***

Discussion

¶7 Under the Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution, investigatory traffic stops must be supported by reasonable suspicion. *See* ***State v. Post***, 2007 WI 60, ¶¶10 & n.2, 11-19, 301 Wis. 2d 1, 733 N.W.2d 634. "The burden of establishing that an investigative stop is reasonable falls on the state." ***Id.***, ¶12.

¶8 We employ a common sense test to determine whether an investigative traffic stop was constitutionally reasonable. ***Id.***, ¶13. "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 committed, was committing, or is about to commit a crime." ***Id.*** We look to the totality of the circumstances to determine whether a stop was supported by reasonable suspicion, rather than looking to any of the facts in isolation. ***Id.***, ¶¶13-17.

¶9 McQueen argues that the officer's observation of McQueen crossing the fog line together with the caller's opinion that McQueen was possibly impaired did not amount to reasonable suspicion. First, McQueen contends that crossing a

fog line is not, in itself, a traffic violation, and thus cannot support a stop of his vehicle. *See* WIS. STAT. § 346.13(1) (prohibiting only *unsafe* lane deviations). Next, McQueen argues that the facts do not amount to reasonable suspicion that McQueen was driving while intoxicated. McQueen contends that Rademacher and Lukens could not rely on the tip from dispatch, because they were not told any facts to support the caller's conclusion that McQueen was possibly impaired. McQueen also contends that the driving that Rademacher and Lukens observed did not provide any indication that he was impaired, because both only described common "drifting" within a lane that the supreme court held did not provide reasonable suspicion for a traffic stop in ***Post***. Similarly, he argues that crossing a fog line once is too common to support reasonable suspicion of intoxicated driving.[4]

¶10 The State responds that the totality of the circumstances amounted to reasonable suspicion justifying the traffic stop. The State argues first that the tip in this case was sufficient to justify the traffic stop. *See* ***State v. Rutzinski***, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. Next, it argues that the officers' observations of McQueen's driving, and the fact that the observations were made at 2:00 a.m., provided reasonable suspicion of intoxicated driving. The State concedes that crossing a fog line, in and of itself, is not a traffic violation that would justify a stop. It argues, however, that the tip, the weaving, crossing the fog

[4] McQueen cites federal and other state cases to support his proposition that weaving within one's lane and crossing a fog line do not support reasonable suspicion to justify a traffic stop. Because we are not bound by that precedent, *see* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930, and because Wisconsin cases provide guidance, we decline to consider cases from other jurisdictions.

line, and that it was "bar time," coalesce to reasonable suspicion that McQueen was driving while intoxicated.

¶11 We conclude that the tip in this case does not add anything of value to our reasonable suspicion analysis. However, we also conclude that the remaining facts in the record—that the officers observed McQueen drifting back and forth two to three times within his line and then cross the fog line, at bar time—provided reasonable suspicion of intoxicated driving that supported the stop.

¶12 We begin with an analysis of the call to dispatch reporting that the caller was observing a driver who was "possibly impaired." The supreme court has held that, "[i]n some circumstances, information contained in an informant's tip may justify an investigative stop. However, …. before an informant's tip can give rise to grounds for an investigative stop, the police must consider its reliability and content." ***Id.*** (internal citation omitted). Additionally, the supreme court has recognized that "there may be circumstances where an informant's tip does not exhibit indicia of reliability that neatly fit within the bounds of [case law], but where the allegations in the tip suggest an imminent threat to the public safety or other exigency that warrants immediate police investigation." ***Id.***, ¶26. Thus, a court may consider that a witness described erratic driving, "suggest[ing] that [the driver] posed an imminent threat to the public's safety," when considering whether the tip provided the officer with reasonable suspicion to conduct a traffic stop. ***Id.***, ¶34. At the same time, there is no "blanket rule excepting tips alleging drunk driving from the … reliability requirement." ***Id.***, ¶36.

¶13 We turn, then, to the reliability and content of the tip placed with the police before Rademacher and Lukens stopped McQueen. *See* ***id.***, ¶17. "In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge." ***Id.***, ¶18. Our analysis is based on the totality of the circumstances, so that a tip lacking in veracity may be redeemed by a very strong basis of knowledge, and a tip with a poor basis of knowledge may be redeemed by very strong reliability. ***Id.***

¶14 As the State asserts, the caller in this case provided indications of his or her reliability. The caller "exposed him- or herself to being identified" by providing his or her vehicle description, location, and direction of travel, and by pulling to the side of the road when the officers arrived.[5] *See* ***id.***, ¶32 & n.7. However, the tip lacked any indication of the caller's basis of knowledge.[6] The record establishes that when Rademacher and Lukens stopped McQueen, the only information provided by the caller was that he or she was observing a driver who was "possibly impaired." The officers testified that after they stopped McQueen they learned that the witness had reported seeing McQueen stumbling while getting in and out of his car, driving recklessly and crossing the fog line repeatedly. However, there was no testimony as to when that information reached the police force, and the State does not argue that there was any information in the

[5] Lukens testified that "[w]e had a known complainant who gave us his information that was willing to talk to officers." The trial court found that the caller was an "identifiable citizen."

[6] We recognize, as the State asserts, that the caller stated that he or she was contemporaneously observing McQueen, and that the supreme court has held contemporaneous observations are one way to establish a caller's basis of knowledge. *See* ***State v. Rutzinski***, 2001 WI 22, ¶33, 241 Wis. 2d 729, 623 N.W.2d 516. However, common sense dictates that there must be contemporaneous observations *of something* for the observations to provide a sufficient basis of knowledge. Here, there is no indication the caller relayed any observations before the traffic stop.

collective knowledge of the police force imputed to Rademacher and Lukens when they conducted the stop.[7] *See* ***State v. Alexander***, 2005 WI App 231, ¶13, 287 Wis. 2d 645, 706 N.W.2d 191 ("Under the collective knowledge doctrine, there are situations in which the information in the hands of an entire police department may be imputed to officers on the scene to help establish reasonable suspicion or probable cause." (citation omitted)).

¶15 We are left, then, with only the conclusory statement by an identifiable complainant that he or she was observing a driver who was "possibly impaired." The caller did not provide any facts supporting his or her belief that the caller was witnessing an impaired driver. Without more, this tip does not add to our reasonable suspicion analysis. A witness' report of seeing a driver he or she believes is "possibly impaired" does not indicate what the witness has observed, and therefore is irrelevant to our determination of reasonable suspicion.

¶16 However, we conclude that the remaining facts in the record provided reasonable suspicion for Rademacher and Lukens to conduct an investigative traffic stop of McQueen's vehicle. The officers observed McQueen drifting back and forth within his lane,[8] and then cross the fog line, at bar time. Lukens had five years of experience as a police officer, and observed that, in his experience, McQueen's driving indicated possible intoxication.

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[7] The trial court found that "[d]ispatch gave the officers the location and description of the vehicles, but relayed no specifics other than the suspect was 'possibly impaired.'" The court made no findings of fact regarding whether the caller ever relayed any specifics to the police force, and, if so, when those statements were made.

[8] The testimony at the motion hearing as to the extent that McQueen swerved within his lane is inconsistent. The trial court found that the officers "observed the suspect drift back and forth and cross the fog line." This finding is supported by the officers' testimony, and we therefore uphold it. *See* WIS. STAT. § 805.17(2).

¶17 While McQueen is correct that the supreme court said in ***Post*** that "weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle," the court also explained that "a driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion." ***Post***, 301 Wis. 2d 1, ¶¶24, 38. Moreover, individual facts which in isolation do not amount to reasonable suspicion may accumulate to justify an investigative stop. ***Id.***, ¶37. Thus, the supreme court concluded that there was reasonable suspicion justifying a traffic stop when the driver "was weaving across the travel and parking lanes, … the weaving created a discernible S-type pattern, … [the driver's] vehicle was canted into the parking lane, and … the incident took place at night," even though each fact alone may not have been sufficient. ***Id.*** Similarly, the facts of McQueen drifting back and forth within his lane and then crossing the fog line, and that the event occurred at two in the morning, may well each, individually, be insufficient to justify the stop. Together, though, they provided a reasonable suspicion that McQueen was driving while intoxicated. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.