

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 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. 2009AP1211-CR

Cir. Ct. No. 2009CT73

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC J. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ This is a “weaving within one’s own lane” case. Predictably, Eric J. Martin propounds that *State v. Post*, 2007 WI 60, 301 Wis. 2d

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.

1, 733 N.W.2d 634, is the standard by which all “weaving within one’s own lane” cases must be measured and asserts that the facts in his case are less egregious than those in *Post* such that we should reverse. But Martin overstates the significance of *Post*. As lately clarified by our supreme court in *State v. Popke*, 2009 WI 37, ¶24, 317 Wis. 2d 118, 765 N.W.2d 569, *Post* stands only for the proposition that “weaving within a single lane of traffic, by itself, does not establish reasonable suspicion” necessary to conduct an investigative stop of a vehicle. So, rather than compare individual cases to *Post*, the mission of Wisconsin’s courts is to decide each case on its own merits based on the totality of the circumstances. Here, the officer followed Martin for a full mile, observing that he was weaving in his own lane throughout. This is a significant amount of time to be weaving and the officer was justified in stopping Martin because of it. We affirm.

¶2 Approximately 2:13 a.m. on November 15, 2008, early Saturday morning, about fifteen minutes before bar closing time, a lieutenant for the Menasha police department got behind Martin while traveling on Winchester Road. The lieutenant testified that he “immediately noted that [Martin] was going back and forth within his own lane. Martin “was not crossing into oncoming traffic, and he was not crossing over the line that separates the inside lane and the outside line, but he was going back and forth, and to the point where prior to crossing the center lane, and then he would go back and just prior to crossing, he would go back. It was a constant back and forth.” “Then, [Martin] signaled to make a right hand or a lane change into the outside lane. And I remember there was a signal. He moved over, I moved over. And he continued to move back and forth, and he had gone so far to the right he almost hit the curb that was on the right-hand side.” “And then we are getting pretty close to CB and that’s when he

turned on CB south, and I turned on my lights and pulled him over on CB.” The distance was about a mile. Following the testimony, the trial court denied the motion to suppress. Martin pled no contest and appealed.

¶3 Martin’s appellate brief is basically a comparison of the above facts with the facts in *Post*. He points out, for example, that the driver in *Post* was driving at least partially in the unmarked parking lane. He also explains that the roadway in which Post was driving was 22-24 feet wide, twice as wide as the 10-12 feet in his own case. He further notes that Post was seen driving in an “S-type” pattern down the highway and that is missing in his case.² Based on these differences, he contends that “compared to *Post* (which the State concedes was more outrageous than the facts here) ... [there was no] reasonable suspicion to stop the vehicle.”

¶4 But as we said at the top of our opinion, the facts in *Post* do not provide the postulate by which all “weaving within one’s own lane” cases are gauged. Rather, each case stands on its own facts and is guided by the common sense test of whether “a reasonable police officer, in light of his or her training and experience, [would] suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 301 Wis. 2d 1, ¶13. We look to the totality of the circumstances to determine whether a stop was supported by reasonable suspicion rather than looking at the facts in isolation. *Id.*, ¶¶13-17. In *Popke*, where the defendant also compared his facts to the facts in *Post*, our supreme court reiterated that the totality of circumstances test for the defendant’s

² He also comments that the lieutenant did not accuse him of driving at varying speeds or speeding or driving too slowly or swerving or failing to properly signal a lane change.

particular case was the appropriate method for determining whether law enforcement had reasonable suspicion that a driver was intoxicated. *Popke*, 317 Wis. 2d 118, ¶27. Therefore, we reject Martin’s principle assumption that we measure the facts in his case against the facts in *Post*.

¶5 And here, it is evident that the lieutenant reasonably suspected that he had a drunk driver in front of him. The time was about fifteen minutes before bar closing on an early Saturday morning. The lieutenant saw weaving almost from the moment that he first pulled in behind Martin. This weaving continued for a full mile. While Martin may have successfully avoided crossing the center line or the fog line, the lieutenant observed that Martin was going “back and forth” between the two lines for the whole mile that he followed him. And on one occasion, he almost hit a curb. A reasonable police officer could easily suspect that Martin was intoxicated. In fact, a reasonable citizen could come to the same conclusion. This case is not close. We affirm.

By the Court.—Judgment affirmed.

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