

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 11, 2010**

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. 2009AP1265-CR**

**Cir. Ct. No. 2008CT67**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID L. JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Columbia County:  
ALAN J. WHITE, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.<sup>1</sup> David Johnson appeals a judgment of conviction entered upon a no-contest plea of operating a motor vehicle while

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.21(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicated (OWI), second offense. Johnson argues that the circuit court erred in denying his motion to suppress. We disagree and conclude that the circuit court properly denied Johnson's suppression motion. We therefore affirm.

### **BACKGROUND**

¶2 The following facts are taken from the hearing on Johnson's motion to suppress evidence. Columbia County Deputy Sheriff Greg Bisch observed Johnson's vehicle weaving within its own lane while traveling southbound on Highway 22 in the Village of Pardeeville around 2:47 a.m. The deputy turned on his squad video recorder and began following the vehicle. The road was partially snow-covered. The traffic had left tracks through the snow, but the fog line and the center line were covered and not visible.

¶3 The deputy followed Johnson's vehicle out of Pardeeville on Highway 22. He observed the vehicle over the course of roughly two miles. During that time, he noticed that Johnson's vehicle was unable to follow the tracks left by highway traffic. At the motion hearing, the deputy testified that he had no difficulty following these tracks. He further testified that the vehicle drifted or weaved within its own lane from where he believed the fog line was to where he believed the center line of the road was. He also stated that Johnson's vehicle appeared to have trouble negotiating turns in the highway, going wide to the outside and then jerking back toward the tracks. While following the vehicle through one of the turns, the deputy testified he became concerned that Johnson's vehicle might strike an oncoming vehicle in the opposite lane.

¶4 According to the deputy, once Johnson's vehicle entered Wyocena, the center line became visible, and the deputy observed the vehicle cross over the center line at the intersection of Highway 22 and County G. The deputy activated

his emergency lights and stopped Johnson. Johnson was subsequently charged with OWI, second offense.

¶5 Johnson filed a motion to suppress evidence alleging that the stop was unlawful for lack of reasonable suspicion or probable cause. Following an evidentiary hearing, the circuit court found that Johnson's vehicle had crossed the fog line, then, in correcting its course, drifted across the lane to the area of the center line; had weaved from the right to the left while negotiating curves in the road; and was in the area of the center line while negotiating a curve and had come close enough to an oncoming vehicle to cause concern that the two vehicles might collide. The court also found that when Johnson's vehicle entered Wyocena its wheels had passed "on ... if not over" the center line. The court denied the motion and Johnson was ultimately found guilty of OWI, second offense.

## DISCUSSION

¶6 On appeal, Johnson contends that the circuit court erred in denying his motion to suppress because Deputy Bisch lacked reasonable suspicion to conduct the investigative stop that led to his arrest for OWI. Whether an officer has reasonable suspicion to conduct an investigative stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis.2d 118, 765 N.W.2d 569. We review the trial court's findings of historical fact under the clearly erroneous standard, but review de novo the application of those facts to constitutional principles. *Id.*

¶7 A traffic stop is a seizure within the meaning of the Fourth Amendment. *Id.*, ¶11. Both the United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. As a general rule, a traffic stop is a reasonable seizure if

it is based on either probable cause or reasonable suspicion to believe that a violation has occurred. *Popke*, 317 Wis. 2d 118, ¶11; see also *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634.

¶8 An officer may conduct an investigative stop when the officer has grounds to reasonably suspect, under the totality of the circumstances, that a traffic violation has been or will be committed. *Popke*, 317 Wis. 2d 118, ¶23. 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.” *Post*, 301 Wis. 2d 1, ¶10 (citation omitted). In other words, if those facts would lead a reasonable officer to suspect, based on his or her training and experience, that the individual has committed or is committing a crime, then the officer has the requisite reasonable suspicion to make a stop. *Id.*, ¶13.

¶9 Johnson argues that the deputy lacked reasonable suspicion under the totality of the circumstances to make an investigative stop because his vehicle never crossed the fog line or the center line, appropriately slowed down when entering speed zones, and, contrary to the deputy’s testimony, his vehicle did not drift or weave as it drove around corners. Further, Johnson contends that the deputy’s testimony that Johnson’s vehicle drifted while maneuvering around corners and crossed the fog line or center line is not substantiated by the video recording of the stop. At most, Johnson argues, his vehicle made only minimal deviations over two miles, and the totality of the circumstances do not support a reasonable suspicion that he was driving while intoxicated. We reject these arguments.

¶10 To the extent that Johnson’s arguments challenge the circuit court’s factual findings, we conclude that these findings are not clearly erroneous. Having

reviewed the video recording of Johnson's driving, we acknowledge that the recording is of poor quality, rendering it difficult to verify parts of the court's findings. But the video recording does not clearly contradict these findings, which were based primarily on Deputy Bisch's testimony. This testimony provided a more than adequate basis on which the court could base its findings.

¶11 Based on the court's findings and the uncontroverted testimony of Deputy Bisch, we conclude that the deputy had reasonable suspicion under the totality of the circumstances to stop Johnson for driving while intoxicated. As noted, the court found that Johnson's vehicle crossed the fog line and drifted across the lane to the area of the center line, weaved from the right to the left while negotiating curves in the road, moved close enough to the center line on a curve to cause concern that it might collide with an oncoming vehicle, and either drove on or over the center line in Wyocena. Moreover, Johnson's erratic driving occurred at 2:47 a.m., shortly after bar time. *See Post*, 301 Wis. 2d 1, ¶36 (suggesting that investigatory stop is reasonable when officer observes a vehicle weaving around bar time). Further, Deputy Bisch's training in investigating cases of impaired driving and his four years' experience as a Columbia County Sheriff Deputy contribute to the reasonableness of the stop. These circumstances coalesce to support a reasonable suspicion that Johnson was driving while intoxicated.

¶12 Johnson contends that the facts of this case are less suggestive of reasonable suspicion than the facts in *Post*. We disagree. In *Post*, an officer observed a vehicle traveling partly in a parking lane and partly in a traffic lane around 9:30 p.m., then saw it weave several times across these lanes in an S-type pattern for two blocks. *Id.*, ¶36. The supreme court determined that those facts gave rise to reasonable suspicion to initiate a stop. *Id.*, ¶37.

¶13 We acknowledge that the weaving in this case was less pronounced and occurred with less frequency over a much greater distance than the weaving in *Post*. However, the totality of the circumstances—which include the time of the stop (less than an hour after bar time), the fact that Johnson’s vehicle came close to an on-coming vehicle, and driving on or over the center line in town—supported a reasonable suspicion that Johnson was driving while intoxicated.<sup>2</sup> Accordingly, we affirm the circuit court’s denial of Johnson’s suppression motion, and the judgment of conviction.

*By the Court.* –Judgment affirmed.

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

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<sup>2</sup> Because we conclude that the stop was supported by a reasonable suspicion that Johnson was driving while intoxicated, we do not address whether Deputy Bisch had probable cause to stop Johnson for violating WIS. STAT. § 346.05(1), which requires all vehicles to drive on the right half of the roadway, based on the court’s finding that the wheels of Johnson’s vehicle were “on ... if not over” the center line in Wyocena.

