

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2010

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. 2009AP3001-CR

Cir. Ct. No. 2007CT4

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. LONERGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County:
MOLLY E. GALEWYRICK, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ Michael Lonergan appeals from a judgment of conviction finding him guilty of third offense operating while intoxicated, in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(a). He contends the circuit court erred in denying his suppression motion and admitted improperly seized evidence at trial. We affirm.

BACKGROUND

¶2 While on patrol in Polk County at 12:48 a.m., Deputy Eric Swan spotted Lonergan’s pickup truck weaving within the northbound lane on Highway 46. Swan followed for roughly a mile, during which Lonergan’s vehicle “deviated constantly” from a direct line of travel. In addition, Lonergan made what Swan described as two “erratic steering motions:”

As I got closer to Highway 8, the vehicle approached the rumble strips, just before Highway 8 the vehicle was near the fog line. As it crossed the first rumble strip, it veered towards the centerline. It then wandered back towards the fog line again and upon reaching the second set of rumble strips it again abruptly veered towards the centerline again and then wandered towards the fog line.

Swan conducted a traffic stop and subsequently arrested Lonergan for operating while intoxicated. The circuit court denied his suppression motion, noting “this wasn’t a case of Lonergan simply weaving a couple of times within his lane.”

DISCUSSION

¶3 Lonergan argues Swan lacked reasonable suspicion for the traffic stop. “The question of whether a traffic stop is reasonable is a question of constitutional fact.” *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. “A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. We review the circuit court’s findings of historical fact under the clearly erroneous standard, and we review

independently the application of those facts to constitutional principles.” *Id.* (citations omitted).

¶4 Police may conduct an investigative stop if the officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.*, ¶10 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The intrusion is warranted if the officer reasonably suspects the person stopped is committing, is about to commit or has committed a crime. WIS. STAT. § 968.24; *Post*, 301 Wis. 2d 1, ¶13. “The reasonableness of a stop is determined based on the totality of the facts and circumstances.” *Post*, 301 Wis. 2d 1, ¶13.

¶5 In *Post*, our supreme court held weaving within a single lane of traffic does not alone give rise to reasonable suspicion necessary to conduct an investigative stop of a vehicle. *Id.*, ¶2. However, the court also found the stop in that case reasonable considering the totality of the circumstances. Post was weaving across the travel and parking lanes in a discernible S-type pattern, his vehicle operated outside the designated travel lanes, and the incident took place in the evening at 9:30 p.m. *Id.*, ¶¶36-37. While the court acknowledged that any one of these facts standing alone might be insufficient, it determined the facts, and reasonable inferences about their cumulative effect, gave rise to the requisite suspicion. *Id.*, ¶37.

¶6 Here, the totality of the circumstances supports the officer’s actions. As *Post* emphasized, the time of the stop is relevant. *Id.*, ¶37. In this case, the stop occurred at 12:48 a.m., much closer to the “bar time” mentioned in *Post*. See *id.*, ¶36. Unlike Post’s vehicular movements, Lonergan’s were not a “smooth S-type pattern;” instead, Lonergan made several abrupt course corrections and

“deviated constantly” from a straight line of travel. Although the movements did occur within one lane, Swan described them as “erratic steering motions,” which were not present in *Post* and further support reasonable suspicion. We conclude the totality of the circumstances gave rise to reasonable suspicion that Lonergan was operating while intoxicated.

¶7 Citing *United States v. Lyons*, 7 F.3d 973 (10th Cir. 1993),² and *United States v. Colin*, 314 F.3d 439 (9th Cir. 2002), Lonergan argues that if failure to follow a perfect vector constitutes reasonable suspicion of intoxicated driving, a substantial portion of the public would be subject each day to an invasion of their privacy. While we are mindful that no driver can maintain a perfectly straight course, neither *Lyons* nor *Colin* involved the type of erratic and abrupt course corrections Swan described here. The circuit court properly considered the totality of the circumstances, including the erratic movement within Lonergan’s own lane, when denying the suppression motion.

By the Court.—Judgment affirmed.

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

² *United States v. Lyons*, 7 F.3d 973 (10th Cir. 1993), was abrogated on other grounds by *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995).

