

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 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. 2009AP1779

Cir. Ct. No. 2008TR11539

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

COUNTY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

v.

CALEB L. MANSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Caleb L. Manske appeals from the judgment of conviction entered by the trial court after a six-person jury found him guilty of violating the Milwaukee County ordinance making it unlawful to operate a motor

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

vehicle with a prohibited alcohol concentration, first offense, contrary to WIS. STAT. § 346.63(1)(b) (2007-08).² On appeal, Manske first argues that the trial court erred in denying his motion to suppress evidence because the sheriff's detective who arrested him did not have reasonable suspicion to initiate a traffic stop. Next, Manske submits that the trial court erred when it found that there was probable cause to arrest Manske for operating a motor vehicle while under the influence of an intoxicant. Because there was reasonable suspicion to initiate a traffic stop of Manske's pickup truck and probable cause for the arrest, this court affirms.³

I. BACKGROUND.

¶2 On March 30, 2008, at about 2:00 a.m., Manske was stopped by Milwaukee County Sheriff's Detective Denny Galipo shortly after Manske exited I-94. Galipo testified at the motion hearing that he stopped Manske's pickup truck after observing Manske cross both the right and left fog line and saw Manske drift within his lane of traffic. He explained that the fog line is a line that separates the distress lanes. There is a white line on the right side and a yellow line on the left. At the time he witnessed Manske cross over the left fog line Galipo was actually following another car, but he decided to follow Manske after seeing him cross the fog line.

² Manske was charged with violating a Milwaukee County Ordinance adopting WIS. STAT. § 346.63(1).

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ The court notes that Manske has asked for both oral argument and publication. Oral argument in one-judge cases is extremely rare. Moreover, publication of one-judge cases is prohibited by WIS. STAT. RULE 809.23(4)(b).

¶3 Galipo explained that while following Manske's pickup truck, he saw that the pickup truck was "real close" to the white fog line and drifting within its lane. The pickup truck then exited the freeway, and when it did, Galipo saw the vehicle cross over the white fog line on the ramp. At this time, Galipo activated his lights and pulled over the pickup truck.

¶4 After stopping Manske, Galipo had a brief conversation with him. Galipo asked if there was anything mechanically wrong with his truck. During this conversation, Galipo smelled the odor of alcohol on Manske's breath, saw that Manske's eyes were red and bloodshot, and that his "speech [sic] was thick tongue." Manske admitted that he had been at a bar and while there he had four drinks. At this point, Galipo decided to put Manske through some field sobriety tests.

¶5 Galipo testified that when Manske got out of his vehicle for the field tests he was "a little [un]balanced[,] unsteady." He first had Manske do the alphabet test, which Manske correctly completed. Next he asked Manske to perform the one-leg stand after demonstrating how to do it. Galipo recalled that Manske dropped his foot and his report stated that Manske made "sway[ing] and hopping" actions that were contrary to the instructions he was given. Galipo also asked Manske to perform the "walk and turn heel-to-toe" test. For the walk and turn heel-to-toe test Galipo stated that he showed Manske where to place his feet and how to turn. It was Galipo's opinion that Manske failed this test because he stepped off the line and miscounted when instructed to count and walk. Finally, Galipo administered the "horizontal gaze and nystagmus" test. This test is conducted by moving a light backwards and forwards in front of the eyes of the driver and instructing the driver to follow the light with his or her eyes. Galipo testified that Manske failed that test because "his eyes were bouncing throughout

the whole thing” instead of remaining focused on the light. As a result of Manske’s performance on the tests, in addition to Galipo’s observations, Galipo arrested him. Shortly thereafter, Manske was taken to the police station and another deputy administered the intoximeter test which measures the breath alcohol concentration of a person who blows into the machine. Manske’s test results registered above the legal limit.

¶6 Following Manske’s arrest, he was given three traffic forfeiture citations: operating a motor vehicle while under the influence of an intoxicant; operating a motor vehicle with a prohibited alcohol concentration; and deviation from designated lane, which was later dismissed. Manske moved to suppress evidence, contending that Galipo did not have reasonable suspicion to stop his pickup truck, nor did he have probable cause to arrest him. Following an evidentiary hearing at which Galipo testified, the court reviewed video taken from a camera (squad cam) mounted on the squad car. The video recorded Galipo following Manske’s pickup truck and included Galipo’s narration of the events and Manske’s performance of the field sobriety tests. Ultimately, the trial court denied the motion.

¶7 Months later, a six-person jury trial was held. The jury found Manske not guilty of operating a motor vehicle under the influence of an intoxicant, but did find him guilty of operating a motor vehicle with a prohibited alcohol concentration.⁴ The trial court sentenced Manske the same day. The trial court revoked his driving privileges for six months and ordered Manske to pay a

⁴ The jury verdict read: “We, the jury, find the defendant, Caleb Manske, guilty of Operating with PAC .10 or More (1st), as charged.”

forfeiture of \$150 by September 9, 2009, or serve thirty days in the House of Correction. This appeal followed.

II. ANALYSIS.

¶8 Manske contends that the trial court erred in denying his motion to suppress the evidence because Galipo had neither a reasonable suspicion to stop Manske's truck, nor probable cause to arrest him.⁵

⁵ This court observes that there are several rogue documents either found in the appendix or referenced in the briefs. The first of these documents is purported to be a compilation of squad cam measurements that are not found in the record below but are found in the appendix. An argument is developed in the brief based upon the squad cam measurements. Second, there is an argument based on the "Standardized Field Sobriety Test (SFST) Refresher Training Course Manual" and an online Desk Book, which are, apparently, training manuals for law enforcement officers. Although there were references to the documents, they were not introduced into evidence below. Assertions of fact in a brief that are not part of the record will not be considered on appeal. See *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). Thus, the documents not included in the record below will be stricken.

This court also observes that Manske's attorney has cited numerous unpublished cases in the briefs. Manske's attorney cited two unpublished cases, *State v. Treml*, No. 2009AP1569-CR, unpublished slip op. (WI App Dec. 8, 2009), and *State v. Haanstad*, No. 2007AP821-CR, unpublished slip op. (WI App Oct. 17, 2007), in his main brief, and after the State pointed out the error, the reply brief explained that this was an unintentional error because the case was not designated as unpublished on Fastcase, a legal research database available through the State Bar. However, the reply brief then goes on to argue that, "it is still noteworthy that the Court in *Haanstad* relied on established case law in *State v. Waldner*, 206 Wis. 2d [51], 556 N.W.2d 681 (1996), and *State v. Allen*, 226 Wis. 2d 66, 593 N.W.2d 504 (Ct. App. 1999)[.] in making the decision." Thus, despite the prohibition on citing unpublished cases issued prior to July 1, 2009, see WIS. STAT. RULE 809.23(3)(b) (created by S. Ct. Order 08-02, eff. July 1, 2009), Manske's counsel reiterated her argument based upon the case. This reference to *Haanstad* in the reply brief is then followed by a citation to another unpublished case, *State v. Kramer*, No. 2008AP2369-CR, unpublished slip op. (WI App July 22, 2009), which cannot be cited as it is a per curiam. See RULE 809.23(3)(b) (created by S. Ct. Order 08-02, § 2, eff. July 1, 2009). Next, the reply brief cites to *State v. Tischer*, No. 2009AP992-CR, unpublished slip op. (WI App Jan. 14, 2010), also an unpublished case. While this case could have been cited for persuasive value as it was an authored case decided after July 1, 2009, nothing in the brief alerts the reader that it is being cited for persuasive value only. See RULE 809.23(3)(b) (created by S. Ct. Order 08-02, eff. July 1, 2009). The unpublished cases which were not eligible for consideration as persuasive authority will not be considered.

(continued)

¶9 “A trial court’s determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact.” *State v. Sisk*, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877. When reviewing questions of constitutional fact, we apply a two-step standard of review. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. First, we will uphold a trial court’s findings of historical fact unless they are clearly erroneous. *Id.* Second, based on the historical facts, we review *de novo* whether a reasonable suspicion justified the stop. *Id.*

¶10 “A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures.” *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. For a traffic stop to comport with the Fourth Amendment, “[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law.” *Id.* “Determining whether there was reasonable suspicion requires [this court] to consider the totality of the circumstances.” *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999).

¶11 The law of reasonable suspicion and investigative stops was summarized in *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305:

While this court does not require perfection in appellate briefs filed with this court, the multiple violations of the procedural rules in this case compel the court to fine appellant’s counsel \$150 to be paid to the Court of Appeals Clerk within sixty days. See *Roy v. St. Luke’s Med. Ctr.*, 2007 WI App 218, ¶12 n.3, 305 Wis. 2d 658, 741 N.W.2d 256 (citation of unpublished cases may be subject to sanction).

Thus, the standard for a valid investigatory stop is less than that for an arrest; an investigatory stop requires only “reasonable suspicion.” The reasonable suspicion standard requires the officer to have “‘a particularized and objective basis’ for suspecting the person stopped of criminal activity”; reasonable suspicion cannot be based merely on an “inchoate and unparticularized suspicion or ‘hunch[.]’” When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances. Stated otherwise, to justify an investigatory stop, “[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.” However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop.

Id., ¶16 (citations and one set of brackets omitted).

¶12 Manske argues that the trial court erred in denying his motion to suppress because “there is insufficient reasonable suspicion to initiate a traffic stop if a vehicle briefly touches the fog line on a freeway ramp during early morning hours.” Manske argues that much of his driving on the night in question was perfectly fine and thus, inconsistent with driving practices of impaired drivers.

¶13 In denying the motion, the trial court stated:

The test is whether, when [Galipo] became focused on your client, whether there was enough information that he garnered in order to have a reasonable suspicion to stop the defendant’s vehicle here, and when he went off the 94 ramp, heading on [45], when he veered or swayed, subtleties within the lane, touching those lines, this court is satisfied there’s a reasonable suspicion to stop at that point in time, and to make further inquiry.

This court agrees with the trial court.

¶14 Galipo testified that he was a detective assigned to the OWI task force. This required special training in detecting impaired drivers. As part of his training, Galipo looks for subtle clues that may indicate that a driver is intoxicated. He related that his job was to go out every night and look for impaired drivers, and he testified that he participated in over one thousand arrests of people who were operating while intoxicated.

¶15 On the morning in question, Galipo explained that his attention was drawn to Manske's pickup truck when he saw the pickup truck drive over a fog line on the exit ramp. He then followed the truck and observed it "driving real close to the white fog line" and "drifting within its lane." Although Manske did not cross over into another lane, Galipo believed that this driving was not reasonable driving. He followed the vehicle until the pickup truck exited, and at that point he saw it cross over the white fog line on the exit ramp. Galipo told the court that some of the driving he observed by Manske were actions consistent with driving by people who are impaired. Galipo's testimony was basically confirmed by the squad cam video that was played during the motion hearing. Galipo cautioned, however, that his vision that evening was better than that of the squad cam as the squad cam was mounted on the far right passenger side of the car.

¶16 Manske submits that because his driving was in some respects not consistent with an impaired driver, Galipo did not have reasonable suspicion to stop him. However, the test for reasonable suspicion is not whether all of the driver's actions constituted erratic driving. Rather, the test is whether some of the truck's movements gave rise to a reasonable suspicion that the driver may be impaired. Here, Galipo's attention was drawn to Manske when he touched the fog line. Upon following the truck, Galipo saw the truck being driven close to the fog line and drifting within the lane. When Manske exited the ramp, Galipo saw the

pickup truck actually cross the fog line. At this point, Galipo decided he had reasonable suspicion to stop the pickup truck. These observations fell well within the standard of “specific articulable facts and reasonable inferences from those facts” to create a reasonable suspicion that the pickup driver was violating the law. See *Gammons*, 241 Wis. 2d 296, ¶6.

¶17 As noted, Manske also argues that the trial court erred in determining that there was probable cause to arrest Manske for operating a motor vehicle while under the influence of an intoxicant.

¶18 “Probable cause to arrest is the sum of evidence within the arresting officer’s knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.” *State v. Nieves*, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. “Probable cause to arrest does not require ‘proof beyond a reasonable doubt or even that guilt is more likely than not.’ It is sufficient that a reasonable officer would conclude, based upon the information in the officer’s possession, that the ‘defendant probably committed [the offense].’” *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (citations omitted). In addressing the probable cause needed to make an arrest for suspected operating while intoxicated, this court has advised that the test for probable cause in an OWI arrest is the same as that for all arrests: The totality of the circumstances must be examined to determine whether the “‘arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.’” *Id.* at 356-57 (quoting *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)).

¶19 In determining that Galipo had probable cause to arrest Manske, the trial court commented that:

Upon talking to [Manske] [Galipo] smelled alcohol, and noticed his eyes, and he said he had four drinks. There's some dialogue as to whether or not they were twelve ounces or sixteen ounces or pints, I couldn't quite hear what the responses really were.

But the fact of the eyes, smell of alcohol, and acknowledgement of four drinks, was enough to proceed with the balance of the test.

Looking at the totality of the circumstance[s], recognizing that standing on one foot, counting out thirty seconds at one million, two million, three million, it's hard for any one, he did show a certain amount of unsteadiness and hopping, it wasn't the most artfully done test, though I wish the officer would have done it a little slower on the eye test, the officer looked like he was conducting a little bit of an orchestra.

Under the totality of the circumstances of what this court viewed on the DVD, and based upon the officer's testimony, court finds there's probable cause to arrest him for OWI first.

This court agrees. Much of Manske's argument is devoted to his belief that the field sobriety tests were not administered correctly. Addressing Manske's challenge to Galipo's field sobriety testing procedure, this court notes that Galipo testified that he was originally trained to conduct field sobriety tests in the mid-1990's. With regard to the manner in which Galipo conducted the tests, a state witness at trial, Sergeant Catherine Trimboli, testified that Galipo administered the tests in a manner consistent with his training and National Highway Traffic Safety Administration (NHTSA) standards in existence at the time he was trained. Further, she advised that there is no requirement that an officer go through a refresher course. Consequently, Galipo's administering of the field sobriety tests was appropriate and within the standards.

¶20 With regard to Manske’s performance of the field sobriety tests, Galipo testified that after observing an odor of alcohol on Manske’s breath, his bloodshot eyes and “thick tongue,” he decided to put Manske through some field sobriety tests. Galipo conceded that Manske was able to recite the alphabet; however, Manske was not as skillful when attempting the one-leg stand. Galipo testified that despite being given a demonstration, Manske both hopped and swayed during the test. Next, Galipo asked Manske to do the walk and turn heel-to-toe test. Galipo both explained and demonstrated the test, but Manske was unable to perform it correctly, as he stepped off the line and miscounted. Finally, Galipo administered the horizontal gaze and nystagmus test. Galipo told the court that he was looking for smoothness when the person follows a penlight moving back and forth. Galipo said that Manske’s eyes “were bouncing throughout the whole thing.”

¶21 Galipo’s initial observations, coupled with Manske’s field sobriety test failures, were sufficient to give Galipo probable cause to arrest Manske for operating while intoxicated. Given all of this, there was probable cause to arrest Manske for operating a motor vehicle while under the influence of an intoxicant.

¶22 As a result, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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

