

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 2, 2010**

A. John Voelker  
Acting 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. 2010AP978**

**Cir. Ct. No. 2009TR5278**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**OUTAGAMIE COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANIEL C. TORREANO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Daniel Torreano appeals a judgment of conviction for first-offense operating while intoxicated. Torreano argues the arresting officer lacked reasonable suspicion to stop him. We disagree and affirm.

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<sup>1</sup> 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.

## BACKGROUND

¶2 Deputy Scott Sweetman testified he overheard a radio transmission at approximately 3:05 on a Sunday morning. Winnebago County reported to Outagamie County that a tipster had reported a possible impaired driver in a grey Mustang driving north on Highway 41. Sweetman then responded in his squad car to watch for the suspect vehicle, parking on the highway median. Sweetman received no identifying information about the tipster, who had exited the highway prior to Sweetman intercepting the Mustang.

¶3 Sweetman testified he observed a grey Mustang drive by at about 3:10 or 3:15, and he estimated the vehicle was traveling about sixty-five miles per hour, which was the speed limit. Sweetman followed the vehicle and, when he was ten to twelve car lengths behind it, observed it “weaving in its right lane of traffic.” Sweetman testified:

[A]nd when I say weaving, the two right tires on the motor vehicle had come in contact with the solid white fog line, and the vehicle then moved over to the left side of the right lane of traffic to where the two left tires did come in contact with the center line.

Sweetman explained there were two northbound lanes of traffic on the highway and that the outside edges of the Mustang’s tires came to the center of both the right fog line and the dashed center dividing line. Sweetman testified the travel from one line to the other occurred over approximately thirty seconds and a distance of about a half-mile. Sweetman explained the Mustang had moved gradually to the right line and then gradually to the left line.

¶4 Sweetman also testified the Mustang contacted the fog line “I believe three times[,]” and the dashed dividing line twice. Sweetman was asked,

“And in what sequence? That is, did they alternate, or did they touch three times on one side and then two times on the other?” Sweetman responded, “I don’t remember. I don’t recall.”

¶5 Torreano contended Sweetman’s recollection was hazy and that the circuit court could not rely on his specific testimony about how far the Mustang’s tires traversed the highway’s lines, because Sweetman also testified, and then confirmed, that the lane dividing line was yellow, when in fact those lines are always white. Addressing Torreano’s motion to suppress, the circuit court stated it “does not put any stock into the anonymous tip that was given ....”<sup>2</sup> The court continued:

The only question in this case is was the driving, the touching, actually going over the solid line at least partially three times, and then the ... dividing line twice, in what the officer described as a slow motion where the vehicle apparently went to the right, and then gradually came over and touched the dividing line, then went back and forth,<sup>3</sup> was that reasonable suspicion?

The court concluded the driver’s difficulty maintaining control of the vehicle, coupled with the time of day, constituted reasonable suspicion. After a jury trial, Torreano was convicted of operating while intoxicated and acquitted of operating with a prohibited alcohol concentration. Torreano now appeals, arguing the circuit court should have granted his suppression motion.

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<sup>2</sup> On appeal, the State disavows any reliance on the tip to support reasonable suspicion. It also acknowledges Sweetman’s testimony about the line color was clearly erroneous.

<sup>3</sup> In light of Sweetman’s testimony and the context of the court’s quoted language, we interpret the circuit court’s statement that the vehicle “went back and forth” to mean not that the vehicle moved back and forth across the full lane of traffic, but that, after it touched the dashed dividing line on the left, the vehicle moved off and then back onto the same line.

## DISCUSSION

¶6 To perform an investigatory traffic stop, an officer must be able to reasonably suspect that the person has committed a law violation. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. “The reasonableness of a stop is determined based on the totality of the facts and circumstances.” *Id.* We review the circuit court’s findings of historical fact under the clearly erroneous standard, but independently apply those facts to constitutional principles. *Id.*, ¶8.

¶7 In *Post*, our supreme court “adopt[ed] neither the bright-line rule proffered by the State that weaving within a single lane may alone give rise to reasonable suspicion, nor the bright-line rule advocated by Post that weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion.” *Id.*, ¶26. There, the court concluded there was reasonable suspicion under the totality of the circumstances because the driving occurred at 9:30 p.m., Post swerved in a gradual “s” motion a few times over the course of two city blocks, and the lane Post swerved across was unusually wide because it included a parking lane. *Id.*, ¶¶36-37. However, the court “acknowledge[d] that this case presents a close call ....” *Id.*, ¶27.

¶8 While this case also presents a relatively close call, we agree with the circuit court that the stop was supported by reasonable suspicion. That Torreano was observed driving in the early morning hours, within forty-five minutes of “bar time,” is a highly significant factor. This factor is even more significant given that it was a Saturday night / Sunday morning. Additionally, Torreano was observed first favoring the right side of the lane, apparently deviating a few inches either way such that his tires touched the fog line, moved off, then on, then off, then on, then off, and the vehicle then continued moving

gradually to the left and favored that side of the lane, with its tires on the fog line, then off, and then on again. Torreano's favoring one far side of the lane, and then moving across and favoring the other far side of the lane within a half-minute, when observed at about 3:10 or 3:15 in the morning, was sufficient to create a reasonable suspicion that he was driving while intoxicated.

*By the Court.*—Judgment affirmed.

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

