

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 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. 2010AP1300-CR

Cir. Ct. No. 2009CT2460

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN R. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
WILLIAM E. HANRAHAN, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Brian Rogers appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a). Rogers argues

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.

the circuit court erred when it denied his motion to suppress evidence obtained as a result of the investigatory stop of his vehicle because the arresting officer lacked reasonable suspicion to stop his vehicle. We disagree and affirm.

BACKGROUND

¶2 On May 9, 2009, at approximately 1:28 a.m., Dane County Deputy Sheriff David Lambrecht observed a vehicle driven by Rogers traveling eastbound on East Washington Avenue in the City of Madison. Lambrecht observed both right side tires of Rogers' vehicle, which was traveling in the center lane of three lanes of traffic completely cross the dotted white line dividing the center lane from the adjoining right lane. Rogers' vehicle returned to its lane of traffic after three or four seconds, and then again partially crossed over into the right lane of traffic for another three or four seconds before it "corrected back to the center lane." According to Lambrecht, "[j]ust after that, [Rogers'] vehicle ... drifted to its left in the center lane," then back to the center of its lane and then "drifted to the left in the center lane with both left side tires on the divider." Lambrecht's observations of Rogers' vehicle took place over the span of one mile before he initiated a traffic stop based on his belief that Rogers was operating his motor vehicle while impaired.² Lambrecht also believed that Rogers had committed a traffic violation by crossing the white broken line.

¶3 Rogers moved to suppress evidence which was obtained as a result of his detention and arrest, arguing that his driving deviations were insufficient to

² Deputy Lambrecht recorded a video from his squad car of the incident which was shown at the suppression hearing. That video, however, is not part of the record before us on appeal.

give rise to reasonable suspicion necessary for a traffic stop. In particular, Rogers argued that Lambrecht did not have reasonable suspicion to believe he had committed a traffic violation, specifically a violation of WIS. STAT. § 346.13(1)³ by crossing over the white dotted line dividing the lanes of traffic. The circuit court denied Rogers' motion, concluding Lambrecht had reasonable suspicion to believe Rogers had violated § 346.13(1). After his motion to suppress was denied, Rogers pled no contest to OWI, second offense, and a judgment of conviction was entered by the court. Rogers appeals.

DISCUSSION

¶4 For an officer to initiate a traffic stop without violating an individual's Fourth Amendment rights, the officer must have either probable cause or reasonable suspicion to believe that the individual is committing, is about to commit, or has committed a crime. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. An officer has a reasonable suspicion if he or she 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.” *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569 (citing omitted).

³ WISCONSIN STAT. § 346.13(1) provides:

Whenever any roadway has been divided into 2 or more clearly indicated lanes, including those roadways divided into lanes by clearly indicated longitudinal joints, the following rules, in addition to all others consistent with this section, apply:

(1) The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.

“[W]hat constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶5 Whether Lambrecht had reasonable suspicion to stop Rogers is a question of constitutional fact, which presents a mixed question of fact and law. *Post*, 301 Wis. 2d 1, ¶8. We will uphold the circuit court’s factual findings unless they are clearly erroneous, but will independently review the application of those facts to constitutional principals. *Id.*

¶6 Rogers contends that Lambrecht did not have reasonable suspicion to stop his vehicle because crossing the white broken lines was not a violation of any traffic law, in particular WIS. STAT. § 346.13(1), and because his driving was not indicative of an individual driving while intoxicated.

¶7 We do not address whether Rogers violated WIS. STAT. § 346.13(1), or any other statute, when he crossed over the white broken traffic line because we conclude that even assuming he did not, Lambrecht’s observations nevertheless gave rise to reasonable suspicion warranting the stop.

¶8 In *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), the supreme court rejected an argument that lawful conduct cannot form the basis for reasonable suspicion. The court explained that if such conduct could not, “there could never be investigative stops unless there [were] simultaneously sufficient grounds to make an arrest.” *Id.* at 59. Thus, the legality or illegality of Rogers’ actions is immaterial to our reasonable suspicion analysis.

¶9 Although “weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop,” weaving in a single lane of traffic may give rise to sufficient reasonable suspicion when viewed in light of all the circumstances. *Post*, 301 Wis. 2d 1, ¶2. For example, in *Post*, the supreme court concluded that there was reasonable suspicion for an investigatory stop in light of the nature and frequency of the defendant’s weaving—“smooth ‘S-type’” weaving within an extra wide traffic lane over the distance of two blocks—and the time the incident took place—9:30 p.m. *Id.*, ¶¶5, 35-36.

¶10 Here too, the totality of the circumstances provided Lambrecht with reasonable suspicion to initiate a traffic stop. Lambrecht observed Rogers’ vehicle weave both within and outside its lane multiple times over the span of approximately one mile. Rogers’ pronounced weaving, in conjunction with the fact that the incident took place around bar time, was adequate to give rise to a reasonable suspicion that Rogers was driving under the influence of intoxicants, justifying the investigatory stop of Rogers’ vehicle. *See id.*, ¶36 (suggesting that investigatory stop is reasonable when officer observes a vehicle weaving around bar time). Accordingly, we affirm the denial of Rogers’ motion to suppress 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).

