COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3092 **Cir. Ct. No. 00-TR-18678**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

VILLAGE OF OREGON,

PLAINTIFF-RESPONDENT,

V.

ROBYN R. SUNDAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Robyn R. Sunday appeals a judgment of the trial court finding her guilty of operating a motor vehicle while under the influence of an intoxicant as a first offense. Sunday's argument on appeal is that the stop of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

her vehicle was not supported by reasonable suspicion and that, therefore, her motion to suppress evidence should have been granted. We disagree and affirm.

Background

¶2 This case concerns Sunday's arrest on September 6, 2000, for driving while under the influence of an intoxicant. Following her arrest, Sunday moved to suppress evidence on the ground that the arresting officer did not possess a reasonable suspicion to conduct the traffic stop that led to her arrest.

¶3 At the suppression hearing, the arresting officer testified to the following. On September 6, 2000, the officer was following a vehicle driven by Sunday on Highway 14. The officer observed Sunday's vehicle "veer[]" to the right, causing her passenger side tires to cross the white fog line by about a foot. Sunday's vehicle straddled the white fog line for about 100 to 150 feet before returning to its traffic lane. The officer continued to follow Sunday and observed her vehicle approach an exit lane on the right-hand side of the road, which was separated from the highway by a white dotted line. Sunday's vehicle's passenger side tires crossed over the white dotted line and straddled the dotted line for the length of the line, "and then right at the last second," Sunday's vehicle returned to its lane and continued on Highway 14. The officer continued to follow Sunday as the highway curved to the right. Sunday's vehicle "cut the [curve] a little sharp, and again the tires crossed the white fog line" for the length of the curve. Sunday's vehicle did not touch the gravel on the side of the highway and, apart from the observations above, the officer did not observe Sunday exhibit any erratic driving or swerving.

¶4 Based on this information, the officer stopped Sunday and administered several field sobriety tests, which Sunday failed. The officer arrested

Sunday for operating a motor vehicle while intoxicated. A subsequent intoximeter test of Sunday's breath yielded a blood alcohol content of .13%.

¶5 The trial court denied Sunday's motion to suppress. Following a stipulated trial, the trial court found Sunday guilty of operating a motor vehicle while under the influence of an intoxicant.[2]

Discussion

¶6 Sunday argues that the officer did not have a reasonable basis to suspect that she was committing a crime because she was not driving erratically and "merely crossed a fog line by a minuscule amount on three occasions." A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects "'that criminal activity may be afoot.'" ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). "The question of what constitutes reasonable suspicion is a common sense

[2] The procedural events are actually more complex than laid out here. Sunday initially moved to suppress evidence in a motion to Judge Robert A. DeChambeau. After Judge DeChambeau denied her motion, Sunday pled no contest to operating a motor vehicle with a prohibited blood-alcohol content as a first offense and appealed her conviction. In an unpublished opinion, the court of appeals rejected her appeal on the ground that her no contest plea to a civil charge waived her nonjurisdictional defects and defenses, including her claimed constitutional rights violation. Sunday moved to reopen her case, which was granted by Reserve Judge Robert R. Pekowsky. Sunday and the Village agreed to a trial on stipulated facts before Judge Stuart Schwartz and it is Judge Schwartz who entered the final judgment in this case. Neither party suggests that the procedural circumstances of this case substantively affect our review.

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). When considering whether reasonable suspicion exists, an officer is not required to rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶7 "When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision." ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279 (citations omitted).

¶8 The officer stopped Sunday in part based on his belief that she had violated traffic ordinances. We note first that the officer's subjective belief is irrelevant to our inquiry. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987) ("As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal."). Nonetheless, the Village asserts that Sunday's conduct was "arguably a violation of WIS. STAT. § 346.13, **Driving on roadways laned for traffic** and WIS. STAT. § 346.89, **Inattentive driving**," and we must address the issue. Sunday responds that her actions did not violate any traffic laws

because she did not endanger "the safety of a passenger in another vehicle."[3] We agree with Sunday. The record contains no evidence that Sunday's conduct interfered with either her vehicle's safety or the safety of another vehicle. Absent such evidence, the arresting officer had no reasonable belief that Sunday was violating either of the traffic laws cited by the Village.

¶9 Nonetheless, we conclude that a reasonable police officer would suspect that Sunday was driving while impaired. The officer observed Sunday deviate from her lane on three occasions. Of the three observations, the most illuminating is the officer's testimony that Sunday, upon approaching an exit lane, straddled the dotted white line with her car "and then right at the last second" returned her vehicle to its original traffic lane. From this observation, we draw the reasonable inferences that Sunday did not intend to straddle the dotted white line and that she quickly corrected at the last second after realizing she was straddling the line.

¶10 In addition, common experience tells us that drivers do not normally cross over right side fog lines unless they are distracted or impaired. Thus, the officer could infer from the two fog line crossovers, combined with the dotted white line straddle, that Sunday was not paying attention or was impaired.

[3] We note that Sunday contends that, in order to conduct a traffic stop based on a violation of a traffic law, an officer must have probable cause to believe that a traffic violation has occurred, citing ***Whren v. United States***, 517 U.S. 806, 810 (1996). However, as we determined in ***State v. Griffin***, 183 Wis. 2d 327, 515 N.W.2d 535 (Ct. App. 1994), an officer may perform an investigatory stop of a vehicle based on a *reasonable suspicion* of a non-criminal traffic violation. *See* ***id***. at 331-34; *see also* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) ("[A]n officer may make an investigative stop if the officer 'reasonably suspects' that a person has committed or is about to commit a crime, or reasonably suspects that a person is violating the non-criminal traffic laws …." (citations and footnote omitted)); ***State v. Colstad***, 2003 WI App 25, ¶¶10-13, *review denied*, 2003 WI 32 (Apr. 22, 2003), No. 01-2988-CR.

Although there are a number of innocent explanations for why Sunday may have inadvertently left her traffic lane three times, one reasonable inference is that her attention was impaired by alcohol consumption. The fact that Sunday's vehicle was not weaving supports an innocent explanation for her lane deviations; but, again, an officer need not rule out the possibility of innocent behavior. ***Anderson***, 155 Wis. 2d at 84.

¶11 Sunday argues that the Village has waived its right to assert that reasonable suspicion existed that she was driving while under the influence of an intoxicant by failing to raise this argument in its responsive brief. However, "[i]t is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). Moreover, "[w]e may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether we do so *sua sponte* or at the urging of a respondent." ***State v. Truax***, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989).

¶12 In her defense, Sunday cites four out-of-state cases in which the court concluded reasonable suspicion did not exist in circumstances where a driver crossed the fog line, including ***United States v. Gregory***, 79 F.3d 973, 978-79 (10th Cir. 1996) (single incident in which truck crossed fog line by about two feet); ***United States v. Ochoa***, 4 F. Supp. 2d 1007, 1011-13 (D. Kan. 1998) (vehicle drifted one time onto shoulder and immediately corrected); ***Crooks v. State***, 710 So. 2d 1041, 1042-43 (Fla. Dist. Ct. App. 1998) (vehicle drifted undetermined distance over fog line three times for an undetermined amount of time); ***Rowe v. State***, 769 A.2d 879, 884-89 (Md. 2001) (vehicle momentarily crossed fog line one time and later touched the fog line during a 1.2 mile observation of the vehicle). However, these cases addressed whether the

observations violated the respective states' traffic laws. We have already concluded that Sunday's behavior did not violate Wisconsin's traffic laws.

¶13 In the case which is the most factually similar, ***Crooks***, it appears the court gave short shrift to consideration of intoxication because the *officer* did not think the driver was intoxicated. *See* ***Crooks***, 710 So. 2d at 1042. Similarly, in ***Gregory***, the court rejected reasonable suspicion of intoxicated driving because the officer did not intend to investigate whether the driver was intoxicated. *See* ***Gregory***, 79 F.3d at 978. The court in ***Ochoa*** also talks of the officer's "concerns" but less clearly relies on the officer's subjective beliefs. *See* ***Ochoa***, 4 F. Supp. 2d at 1012. All three cases reveal a lack of understanding of Fourth Amendment jurisprudence because the officer's subjective belief is irrelevant.

¶14 In ***Rowe***, the court noted that the State argued that the officer possessed reasonable suspicion to believe the defendant was driving while intoxicated. *See* ***Rowe***, 769 A.2d at 889. However, rather than address whether the driver might have been intoxicated, that court instead considered whether the officer could have stopped the vehicle under the officer's "community caretaker function," which allows an "officer [to] stop a vehicle to ensure the safety of the occupant without a reasonable suspicion of criminal activity." *See* ***id.*** at 889-90. In this case, the Village does not suggest that the officer could have stopped the vehicle under the "community caretaker function," and we do not address the issue.

¶15 More importantly, all four cases are distinguishable on their facts. There is no bright line between reasonable suspicion and no reasonable suspicion. We conclude that the facts in this case are somewhat more suspicious than the facts in any of the four out-of-state cases. In this case, perhaps if the only

evidence were that Sunday straddled the right fog line by an unspecified amount three times, we would reach a different result. But here, the evidence includes an apparent quick correction when Sunday was straddling the dotted white line between her lane and the exit lane.

By the Court.—Judgment affirmed.

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