**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 23, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal Nos. 2010AP2818**
**2010AP2819**

**Cir. Ct. Nos. 2009TR6172**
**2009TR6291**
**2009TR6173**

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

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**COUNTY OF SHEBOYGAN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN A. TAYLOR,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sheboygan County, ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] John A. Taylor stands convicted of operating a vehicle while intoxicated, operating with a prohibited blood alcohol concentration

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and improper lane deviation. He appeals on the basis of ***State v. Post***, 2007 WI 60, ¶2, 301 Wis. 2d 1, 733 N.W.2d 634, holding that repeated weaving by a driver within a single lane does not alone give rise to the reasonable suspicion necessary for a traffic stop.[2] He claims that his case is just the scenario identified by the ***Post*** court. We hold that the facts here are not like those envisioned in ***Post*** and affirm.

¶2 The pertinent facts need be only briefly related. On November 21, 2009, at about 1:00 a.m., a Sheboygan county deputy sheriff observed that the red taillights of the automobile ahead of him appeared to show the vehicle driving in and out of the traffic lane—crossing both lanes of traffic. The deputy accelerated so as to get behind the vehicle. The deputy then observed the vehicle to "self correct" for a period of time and then begin to do the "impaired driving" again. The driver "started weaving within his own traffic lane and then towards the fog line. He would weave where the wheels are going—would go up to the fog line and then *just break and correct himself* back into his own lane." (Emphasis added). When the deputy saw this happen again, he decided to activate his lights to make the stop because the deputy "didn't think he was going to self-correct" and was going to go into the ditch. Even for the short time the deputy was behind the vehicle, he saw that it "did cross the white fog line." There was a videotape of the incident and the trial court, after reviewing the tape, found that the vehicle "appeared to travel at or near the fog line for a considerable distance. He was going toward the fog line. As noted by defense counsel not erratically, but was getting close to the fog line." The trial court concluded that the deputy had

[2] Although Taylor is appealing his judgment of conviction, the issue he raises is related to the order denying his pretrial motion to suppress. That order was entered by the Honorable Gary Langhoff in the circuit court of Sheboygan County.

reasonable suspicion to stop the motor vehicle. The driver was identified as Taylor. Taylor appeals the conclusion of the trial court.

¶3 In ***Post***, the police officer observed Post travelling "in a smooth 'S-type' pattern" … a "smooth motion toward the right part of the parking lane and back toward the center lane." ***Id.***, ¶5. The car came within twelve inches of the center line and within six to eight feet of the curb. ***Id.*** The movement "was neither erratic nor jerky and the car did not come close to hitting any other vehicles or … hitting the curb at the edge of the parking lane." ***Id.*** Based on these facts, the supreme court held that the facts gave rise to reasonable suspicion that Post was driving while intoxicated. ***Id.***, ¶38. While the court rejected the State's contention that repeated weaving within one's own lane should be grounds to stop the vehicle as a bright-line rule, it nonetheless concluded that "[m]oving between the roadway centerline and parking lane" was not a slight deviation, as argued by Post. ***Id.***, 29. Significantly, the court stated that there need not be evidence of "erratic" or "illegal" driving. ***Id.***, ¶¶23-24.

¶4 Comparing the facts in ***Post*** with the facts here, this is the stronger case. Taylor did not drive in a "smooth" pattern, but drove at or near the center line three times, then braked and corrected himself. He did not come within twelve inches of the center line; he was at or near the center line. The deputy thought that this was evidence of impaired driving. He was worried about the driver's safety the third time that Taylor went toward the center line. In addition, the timing here was significant—unlike in ***Post***, it was bar closing time when Taylor was pulled over. *See* ***id.***, ¶36. All these circumstances provided reasonable suspicion and justified the stop. Taylor's actions amounted to more than a "slight deviation"—the kind of driving that would not make a person's driving reasonably suspect. Rather, his driving *behavior* is what alerted the deputy to the suspicion

that Taylor was driving while intoxicated. Seeing as how this deputy had forty-five operating while intoxicated arrests in the previous year alone, we think this deputy would know suspicious driving behavior when he saw it.

*By the Court.*—Judgment affirmed.

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