

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 17, 2011**

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. 2011AP276-CR**

**Cir. Ct. No. 2010CT105**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KIM R. KALLENBERG,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 REILLY, J.<sup>1</sup> Kim R. Kallenberg appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Kallenberg argues the circuit court erred when it found that the police officer who stopped Kallenberg's vehicle had reasonable suspicion to conduct a traffic stop. We conclude that the police officer's investigative traffic stop was supported by probable cause and affirm Kallenberg's conviction.

## FACTS

¶2 At approximately 1:33 a.m. on February 14, 2010, Sheboygan Police Officer Michael Beringer was on mobile patrol. As the officer drove in the right-hand lane, he began to follow Kallenberg's vehicle, which was about six to eight car lengths in front of him. While the officer followed, he observed Kallenberg's vehicle deviate from the right-hand lane into the adjacent lane, and then move back into right-hand lane. As Kallenberg did not use a signal, the officer pulled him over. After the officer noticed the smell of alcohol coming from Kallenberg's breath, he asked Kallenberg to submit to a series of field sobriety tests. Kallenberg was subsequently arrested for OWI. Kallenberg was later charged with an OWI, second offense, and operating a motor vehicle with a prohibited alcohol concentration, second offense.

¶3 Kallenberg filed a motion to suppress evidence based on lack of probable cause and reasonable suspicion to pull over Kallenberg's vehicle. An evidentiary hearing was held on the motion on June 8, 2010. Officer Beringer was the only witness to testify. Beringer stated that he pulled over Kallenberg because he violated WIS. STAT. § 346.13(1), which provides that "[t]he 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." Kallenberg argued that he did not violate § 346.13(1)

because the officer was not affected by Kallenberg’s movement. Kallenberg also argued that because no other traffic was affected, he was not required to use a signal under WIS. STAT. § 346.34(1)(b), which provides that “[i]n the event any other traffic may be affected by the movement, no person may turn any vehicle without giving an appropriate signal in the manner provided in WIS. STAT. § 346.35.”

¶4 At the conclusion of the hearing, the circuit court denied Kallenberg’s motion because it determined that the officer had reasonable suspicion based on his observations that Kallenberg was driving while impaired.<sup>2</sup> Kallenberg entered a no contest plea to the OWI charge, and now appeals.<sup>3</sup>

### STANDARD OF REVIEW

¶5 Traffic stops are seizures under the Fourth Amendment and therefore must be reasonable given the circumstances. *State v. Rutzinski*, 2001 WI 22, ¶¶13-14, 241 Wis. 2d 729, 623 N.W.2d 516. A traffic stop is reasonable when a police officer has probable cause to believe that a traffic violation has occurred. *State v. Popke*, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569. Whether there is probable cause for an officer to conduct a traffic stop is a question of constitutional fact. *Id.*, ¶10. A question of constitutional fact is a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634.

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<sup>2</sup> In denying the motion to suppress, the circuit court applied a reasonable suspicion standard. We review Kallenberg’s appeal, however, under the probable cause standard. As probable cause is a higher standard than reasonable suspicion, we need not discuss whether there was reasonable suspicion. See *State v. Gordon*, 159 Wis. 2d 335, 348, 464 N.W.2d 91 (Ct. App. 1990).

<sup>3</sup> The prohibited alcohol concentration, second offense charge was dismissed.

We apply a two-step standard of review to this type of question. *Id.* First, we review the circuit court’s findings of historical fact under the clearly erroneous standard, and second, we review de novo the application of those facts to constitutional principles. *Id.*

## DISCUSSION

¶6 Kallenberg argues that the police officer never observed a traffic violation that would have triggered probable cause to initiate a traffic stop because Kallenberg did not violate either WIS. STAT. §§ 346.13(1) or 346.34(1)(b). As the record indicates otherwise, we affirm Kallenberg’s conviction.

¶7 It is undisputed that Kallenberg deviated from his lane without using a signal, but he argues that no traffic violations occurred as his movement and failure to use a signal did not affect any other traffic. He stresses that the officer never testified that he was affected by Kallenberg’s lane deviation, as the officer did not brake or take any evasive or corrective actions as a result of Kallenberg’s movement. Kallenberg also notes that the officer was traveling six to eight car lengths behind him.

¶8 We hold that there was probable cause that Kallenberg violated WIS. STAT. §§ 346.13(1) and 346.34(1)(b). A driver preceding another has the duty to use the roadway in the usual manner with proper regard for all others using that road and to “properly signal his intentions to deviate from his line of travel.” *Burlison v. Janssen*, 30 Wis. 2d 495, 502, 141 N.W.2d 274 (1966). Furthermore, no driver may deviate from his or her current traffic lane until doing so could be done without endangering other vehicles approaching from the rear. *See Thompson v. Howe*, 77 Wis. 2d 441, 450-51, 253 N.W.2d 59 (1977). Regardless of the officer’s reaction to Kallenberg’s movement, the officer’s car constituted

traffic approaching from the rear. As Kallenberg deviated from his lane of traffic without using a turn signal, and as another vehicle was behind him, we hold that there was probable cause to justify the traffic stop.

### CONCLUSION

¶9 As we hold that the officer had probable cause to conduct the traffic stop of Kallenberg, we affirm Kallenberg's conviction.

*By the Court.*—Judgment affirmed.

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

