

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 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. 2011AP957

Cir. Ct. No. 2010TR3595

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN C. CUSHMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Steven Cushman appeals a judgment of conviction entered for operating a motor vehicle while intoxicated (OWI), first

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

offense. Cushman argues that the circuit court erred in denying his motion to suppress. The court ruled that the state trooper had probable cause to stop Cushman's vehicle after observing that Cushman was not wearing a seat belt. We disagree with Cushman and conclude that the circuit court properly denied Cushman's suppression motion. We therefore affirm.

BACKGROUND

¶2 The following facts are taken from the hearing on Cushman's motion to suppress evidence. Wisconsin State Patrol Trooper James Sawyer testified that he was on duty and parked at the intersection of Sand Lake Lane and Highway 133 in the Town of Cassville on May 24, 2010, at around 6:30 p.m. The trooper testified that he observed Cushman's vehicle approaching from a distance on Highway 133 and coming down a hill. He observed Cushman's vehicle cross the center lane of the highway, up to a third of the vehicle's width. The trooper testified that, when Cushman's vehicle was approximately fifteen to twenty feet away, he observed that Cushman was not wearing his seat belt. After Cushman's vehicle passed by, the trooper pulled his squad car onto the highway and made a traffic stop of Cushman's vehicle.

¶3 The trooper made contact with Cushman.² The trooper testified he spoke with Cushman about why he had initiated the stop. Trooper Sawyer testified that Cushman admitted during their conversation to driving left of the center line on the curve on Highway 133, and stated that he did this because his

² The stop and subsequent interview was recorded by a dash-mounted video recorder in the trooper's vehicle, and a DVD of this recording was introduced at the suppression hearing. However, the DVD has no audio of the first several minutes, which includes the trooper's conversation with Cushman described above.

phone was ringing. The trooper also testified that Cushman admitted to not wearing his seat belt because he was only making a short trip.

¶4 At the suppression hearing, Cushman did not dispute that he was not wearing his seat belt that night or that his vehicle had crossed over the center line. Rather, Cushman testified that it would have been impossible for the trooper to have seen that the seat belt was not latched prior to the stop, as the latch would have been obscured from view based on where the trooper was parked.

¶5 At the end of the evidentiary hearing, the circuit court denied Cushman's motion to suppress, concluding that the trooper had probable cause to believe that Cushman drove his vehicle over the center line, contrary to WIS. STAT. § 346.13(1), and that Cushman was not wearing his seat belt, contrary to WIS. STAT. § 347.48(2m)(b). Following a jury trial, Cushman was found guilty of first offense OWI, and judgment was entered against him.

DISCUSSION

¶6 On appeal, Cushman challenges the court's denial of his motion to suppress, arguing that the stop was not supported by reasonable suspicion or probable cause to believe that he had committed a traffic offense. Whether a trooper has reasonable suspicion or probable cause to conduct an investigative stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We review the circuit court's findings of fact under the clearly erroneous standard; however we review de novo the application of those facts to constitutional principles. *Id.*

¶7 A traffic stop is a seizure within the meaning of the Fourth Amendment. *Id.*, ¶11. Both the United States Constitution and the Wisconsin

constitution prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. A law enforcement officer may conduct a traffic stop of a vehicle when the officer has probable cause to believe a traffic violation has occurred. *Popke*, 317 Wis. 2d 118, ¶13. “Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a traffic violation has occurred.” *Id.*, ¶14 (citations omitted). The officer “must be 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. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted).

¶8 WISCONSIN STAT. § 347.48 (2m)(gm) mandates seat belt use when operating a motor vehicle equipped with seat belts.³ In 2009, this statute was amended to remove language that had previously prohibited a law enforcement officer from stopping a vehicle based solely on the failure to wear a seat belt. 2009 Wis. Act 28, § 2991. Thus, a violation of the seat belt law is now a primary offense for which a law enforcement officer may initiate a traffic stop.

¶9 Cushman argues that the circuit court erred in denying the motion to suppress because, at the time of the stop, the trooper lacked reasonable suspicion or probable cause to believe that Cushman had either driven his vehicle over the center line, contrary to WIS. STAT. § 346.13(1), or failed to wear his seat belt, contrary to WIS. STAT. § 347.48(2m)(b). In the analysis below, we address only whether the trooper had a valid basis to stop Cushman for an alleged seat belt

³ If a motor vehicle is required to be equipped with seat belts in this state, no person may operate that motor vehicle unless the person is properly restrained in a seat belt. WIS. STAT. § 347.48(2m)(b).

violation, and conclude, based on the trial court's factual findings, that the trooper had probable cause to believe that Cushman had committed a seat belt violation.

¶10 The trial court explained its ruling as follows:

So to the extent that the officer – or the trooper either got lucky and happened to pull over a vehicle where the operator wasn't wearing a seat belt or he actually observed what he testified to, again the DVD is consistent and the soundtrack is consistent with Mr. Cushman's admission to the trooper] ... that he did not have a seat belt on. And I don't know how the officer would have known that unless he had observed it.

¶11 Cushman acknowledges that he was not wearing his seat belt at the time of the stop. However, he argues that the trooper could not have seen whether he was wearing his seat belt as he drove past him, and that the seat belt violation was merely an after-the-fact justification for the stop. Cushman argues that the court found that he admitted to not wearing his seat belt after the stop was made, and did not make any findings regarding whether the trooper actually saw that Cushman did not have his seat belt on.

¶12 We disagree with Cushman's argument that the court did not make any findings regarding whether the trooper saw that Cushman did not have his seat belt on. In denying the suppression motion, the court stated, "I don't know how he could have known that [Cushman was not wearing his seat belt] unless he had observed it." The court reasonably inferred that Cushman's admission that he was not wearing a seat belt was the result of the trooper asking whether he had been wearing his seat belt, and that the trooper would not have asked the question if he had not actually made this observation prior to the stop. This statement indicates that the trial court believed the trooper's testimony that he observed Cushman

driving without his seat belt.⁴ We conclude that this finding is not clearly erroneous.

¶13 Cushman suggests that the court’s finding that both Cushman and the trooper were “honest” and “upright” people indicates that the court could not have accepted the trooper’s testimony that he saw Cushman not wearing his seat belt over Cushman’s own testimony that the trooper could not have seen this. Cushman is mistaken. The court’s finding that Cushman is “honest” and “upright” would not have precluded the court from also finding that Cushman was nonetheless mistaken in his opinion of whether the trooper could have seen that he was not wearing his seat belt at the time.

¶14 For the reasons stated above, we conclude that the trooper had probable cause to believe that Cushman committed a safety belt violation, and the stop was therefore lawful. Accordingly, we affirm the trial court’s denial of the suppression motion.

By the Court.—Judgment affirmed.

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

⁴ Additionally, the court noted that, contrary to Cushman’s testimony that he had been wearing a grey shirt on the day of the stop, the video recording of the stop shows that Cushman was actually wearing an orange shirt at the time. The court found that “the fact that [Cushman] had an orange shirt” would have made it “maybe more evident that he ha[d] a seat belt on or not.”

