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DISTRICT II

September 7, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2124-CR

State of Wisconsin v. Jessica L. Kemp (L.C. #2014CF516)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Jessica Kemp appeals from a judgment convicting her of operating while intoxicated (5th or 6th offense). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ Kemp challenges the denial of her motion to suppress. We conclude that the circuit court properly denied her motion to suppress because the law enforcement officer had reasonable suspicion to stop her vehicle. We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

After her arrest, Kemp moved to suppress evidence that she was operating while intoxicated acquired as a result of a traffic stop. Kemp argued that the officer lacked reasonable suspicion to stop her vehicle. Officer Fosler testified that he observed Kemp's vehicle pass him at a high rate of speed. Kemp appeared to be travelling fifteen miles over the posted speed limit, although the officer did not use an instrument to determine Kemp's speed. As the officer pulled into traffic behind Kemp's vehicle, the officer saw Kemp's vehicle cross the center line and the fog line. The officer testified that his squad car video accurately depicted his observations.

Kemp argued that the officer lacked reasonable suspicion to stop her vehicle because he did not determine the vehicle's speed using an instrument, and the squad car video did not support the officer's testimony that Kemp crossed the center and fog lines. The State disagreed, arguing that the officer's testimony was consistent with the video.

The circuit court found that the squad car video showed Kemp's vehicle travelling left of the center line on at least two to three occasions at a higher rate of speed, as the officer testified. The court concluded that the officer had reasonable suspicion to stop Kemp's vehicle. Kemp then pled no contest, and she seeks review of the decision denying her motion to suppress.

Kemp argues about the standard of review. The standard of review is clearly stated in *State v. Walli*, 2011 WI App 86, 334 Wis. 2d 402, 799 N.W.2d 898. In *Walli*, the court held that when evidence in the record consists of a video recording, an officer's testimony about what is depicted in the video (testimony which a circuit court must assess for credibility) and arguments about what the video depicts, we apply the clearly erroneous standard of review to the circuit court's findings of fact. *Id.*, ¶14.

In *Walli*, as here, the officer testified that the squad car video accurately depicted the circumstances surrounding the traffic stop. *Id.*, ¶4. In *Walli*, as here, the parties argued over what the video depicted. *Id.* In *Walli*, as here, the circuit court “resolve[d] that dispute by exercising its fact-finding function, and its findings are subject to the clearly erroneous standard of review.” *Id.*, ¶14. Kemp does not persuade us that *Walli* is other than controlling in all aspects of this appeal.

We turn to the lawfulness of the traffic stop. An investigative traffic stop is justified when the officer has “reasonable suspicion that a traffic law has been or is being violated.” *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. “Whether reasonable suspicion exists is a question of constitutional fact.” *Walli*, 334 Wis. 2d 402, ¶10. We will uphold the circuit court’s findings of fact if they are not clearly erroneous and, based on those facts, “we review de novo whether a reasonable suspicion justified the stop.” *Id.*, ¶10. We consider “whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *Id.*, ¶8.

Kemp argues that the video does not show a lane deviation. The circuit court based its finding of a lane deviation on the video and the officer’s testimony that he observed Kemp’s vehicle deviate from the lane of travel. The circuit court’s findings are not clearly erroneous. Because the lane deviation was a violation of traffic law, the officer had reasonable suspicion to

stop Kemp's vehicle. *Houghton*, 364 Wis. 2d 234, ¶30.² The circuit court did not err in denying Kemp's motion to suppress evidence.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

² The parties dispute whether Kemp was speeding, which would also have been a basis for the traffic stop. We need not reach this issue because there was reasonable suspicion to stop Kemp's vehicle based upon the lane deviation the officer observed.