

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2007

David R. Schanker
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. 2007AP544

Cir. Ct. Nos. 2006TR4204
2006TR4205

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF ALTOONA,

PLAINTIFF-RESPONDENT,

V.

ADAM LEE FULLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ Adam Fuller appeals a judgment of conviction for operating with a prohibited alcohol concentration, first offense. Fuller argues the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

trial court erred by denying his motion to suppress evidence on the grounds that the arresting officer lacked reasonable suspicion to stop him. We conclude Fuller waived his right to appeal by pleading no contest and thus affirm.

BACKGROUND

¶2 At approximately 2:42 a.m. on April 13, 2006, Altoona police officer Mark Jon Duce observed a vehicle traveling on a straight section of Highway 12. Duce saw the vehicle drift over the “fog line,” a white stripe on the right side of the roadway but before the actual shoulder. The vehicle drifted back toward the center line, without crossing the center line, and again drifted to the right and over the fog line. Duce then activated his emergency lights and stopped the vehicle. Duce requested Fuller perform field sobriety tests and take a preliminary breath test. The preliminary breath test indicated a blood alcohol concentration of .166%. Duce arrested Fuller.

¶3 Fuller filed a motion to suppress evidence, alleging no reasonable suspicion existed to stop the vehicle. Specifically, Fuller contended crossing the fog line did not violate any statute or otherwise give reasonable grounds to stop the vehicle.

¶4 At the motion hearing, Duce testified that Fuller did not violate any law by crossing over the fog line. Duce also testified that Fuller was not speeding and that other than crossing the fog line, Fuller operated his vehicle normally. The court denied Fuller’s motion, stating:

[I]t is a close case but I do believe you factor in the two forty-five a.m. time. There was no testimony of any difficult rain, sleet, no anything of that kind.... [Duce] indicated it wasn’t for a very long period of time, but he did follow and watch the car deviate twice within a very short distance of time, over the fog line twice and then back to

the proper lane. ... I think given the facts and given the circumstances that were testified to he acted appropriately and the stop in my judgment was reasonable under all the circumstances testified to.

After the court denied Fuller's motion, he pled no contest.

DISCUSSION

¶5 A plea of guilty or no contest waives all non-jurisdictional defects and defenses. *County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). The statutory exception to the waiver rule found in WIS. STAT. § 971.31(10) applies only to criminal cases and is therefore unavailable here.²

¶6 The waiver rule is not a rule of appellate jurisdiction and we may in some cases exercise our discretion and decline to apply it. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275, 542 N.W.2d 196 (Ct. App. 1995). In *Quelle*, we declined to apply the waiver rule because: (1) the no contest plea saved time; (2) the issue was squarely before the trial court such that we had an adequate record; (3) there was no evidence that the defendant was appealing to avoid a sentence that was more than expected; and (4) there were no published cases addressing the legal question at issue. *Id.* at 275-276.

¶7 Fuller argues that he meets all four criteria of *Quelle*. While Fuller may have met the first three criteria, he has not met the fourth. Fuller contends there are no published cases addressing whether crossing the fog line can give rise to reasonable suspicion for a stop. Fuller defines the issue too narrowly. The actual issue is whether Fuller's non-illegal behavior could constitute reasonable

² We note that Fuller could have avoided waiver by stipulating to a court trial where the court would determine his guilt or innocence based solely on documentary evidence.

suspicion for a stop. There are many published opinions discussing the reasonable suspicion standard and whether reasonable suspicion can exist absent a traffic violation. Indeed, there is a published Wisconsin Supreme Court opinion that dealt with facts very similar to this case. *See State v. Post*, 2007 WI 60, 733 N.W.2d 634. In *Post*, the driver violated no traffic laws but was stopped because he was weaving in his own lane. *Id.*, ¶¶5-9. The court reiterated that conduct need not be illegal to give rise to reasonable suspicion and examined the behavior under the totality of the circumstances standard. *Id.*, ¶¶24-27. Thus, if we addressed Fuller's case on the merits, we would not develop the law as in *Quelle*, but would simply apply the well-settled standard to a typical fact pattern. Additionally, as a one-judge appeal, this case will not be published and is therefore of no precedential value. *See* WIS. STAT. RULE 809.23(1)(b)(4), and (3).

By the Court.—Judgment affirmed.

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

