COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1544-CR **Cir. Ct. No. 2007CM929**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. FORKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, C.J. The potential issue in this case is an interesting and novel one. We understand that issue to be whether a local traffic officer has authority to effectuate a stop of a vehicle solely based on a presumed violation of a local ordinance relating to vehicle equipment, which ordinance in turn is based on

a department of transportation administrative rule rather than a statute. The trial court answered that question by holding that WIS. STAT. ch. 110, the chapter under which WIS. ADMIN. CODE § TRANS. 305.15(5)(a) is made punishable, provides in particular part, that "[a]ll … law enforcement officers shall assist [the state traffic patrol] in enforcing [ch. 110] … and orders or rules issued pursuant thereto." WIS. STAT. § 110.07(1)(b). The defendant in this case appeals this determination, arguing that localities have no authority to pass ordinances resulting in greater legal exposure to drivers than the statute promulgated by the legislature, and the officer's stop in this instance was predicated on the errant local ordinance rather than any desire to assist the state patrol.

¶2 The first step for an appellate court in every case is to determine our standard of review. At bottom, the issue is whether the officer had reasonable suspicion to support a traffic stop. The question of whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. A question of constitutional fact is a mixed question of law and fact and requires the application of a two-step standard of review. ***Id***. We first review the circuit court's findings of fact under a clearly erroneous standard. ***Id.*** We then independently review the application of those facts to constitutional principles. ***Id***. What constitutes reasonable suspicion is a common sense test. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

¶3 We have carefully perused the record. The trial court did not make findings of fact in this case, per se. Rather, in a prefatory comment to discussing the legal issue, it declared that the "only reason" for the stop of a vehicle driven by Richard J. Forkes was the vehicle's nonfunctioning "high mount stop lamp." This finding is clearly erroneous. The officer testified as follows:

> I was stopped behind a white Buick, and I noticed that the high mount stop lamp for the Buick was not working. The traffic signal then turned green for us to proceed northbound on Appleton Avenue, and within approximately two-tenths of a mile stretch as I was following the Buick, I noticed [it] noticeably weaving within the westernmost lane of travel. It drove onto the clearly visible white space lane dividers where the two lanes that travel northbound Appleton Avenue in the same direction, and from the white spaced lane dividers, it was traveling in an S formation over to the concrete median side curb and almost struck the curb as well three times.

When asked what the road conditions were like, the officer testified that the area was lighted and the roads were dry. The officer was asked to state the reason for the stop. He testified:

> The high mount stop lamp that was not working, as well as my attention being clearly drawn to the—to the noticeable weaving within the traffic lane and almost striking the curb.

¶4 We rarely reverse a trial court's findings of fact under the clearly erroneous rule. This is because it is the trial court's responsibility to find the historical facts. When so found, we defer to the trial court's historical determinations because the trial court is in the best position to make that call. But here, the trial court made no "historical" finding. It did not discuss the "who, what, where, when, why and how." While making historical findings in this way is not essential, the trial court must make a historical accounting of some sort.

¶5 We are convinced that the reason why the trial court found that the "high mount stop lamp" was the "only reason" for the stop was simply because the court thought that, as a matter of law, it could not consider the weaving within one's lane unless the record showed something additional. We get this from the trial court's explanation of ***Post***. According to the trial court, ***Post*** stands for the proposition that "there can be any number of reasons that one might be weaving in

his or her own lane and that alone does not justify probable cause or even reasonable suspicion to stop somebody." We are satisfied that the trial court thought that the State's case would be doomed as a matter of law, unless the high mount stop light violation was that "other justification." Therefore, the trial court's comment was less a finding of fact and more a manifestation of what it considered the law to be.

¶6 But the trial court, and Forkes' counsel for that matter, both misread ***Post***. ***Post*** does not stand for the proposition that weaving within one's lane is *never*, by itself, enough for reasonable suspicion to stop a vehicle. Nowhere did the ***Post*** court say that absent some other reason to stop a vehicle, weaving in one's own lane is legal. Rather, the court suggested that if reasonable suspicion is to be based solely on weaving in one's own lane, it will not suffice if the weaving is "minimal or happens very few times over a great distance." ***Id.***, ¶19. However, the ***Post*** court concluded that, under the totality of the circumstances in that case, reasonable suspicion existed because the degree of weaving over a lane twice the standard size was significant and the incident took place at 9:30 at night. ***Id.***, ¶36. The court further elaborated that while the time was a contributing factor, it was "not as significant as when poor driving takes place at or around 'bar time.'" ***Id.***

¶7 Here, the stop took place at about 12:34 a.m**.** While 9:30 p.m. is before bar time, 12:34 a.m. certainly is "at or around 'bar time.'" ***Id.*** A fact finder *could* find that Forkes was more than just minimally weaving for a short distance within his lane. If the officer's version is truthful, a call that we cannot make, Forkes drove onto clearly visible white space lane dividers, traveled in an S formation over to the concrete median side curb and almost struck the curb three times. There is no magic to staying in one's lane. Being able to stay in the lane does not absolve a driver from the risk of being stopped. The important fact is

how the person is driving within that lane. And the officer's testimony, if believed, gives three pieces of information that tell the fact finder *how* the person was weaving. A trier of fact *could* find that those pieces—again, if believed—show not just weaving, but erratic weaving.

¶8 As we said, we are not the fact finder. The trial court is. Our discussion of the facts is merely to illustrate how ***Post*** does not stand for the proposition that weaving can never be considered the sole reason for a justifiable stop. It can. We reverse and remand with directions that the trial court conduct a historical analysis of what happened. In doing so, it may use the paper record of testimony already adduced or may order a further evidentiary hearing. If the trial court disbelieves or discounts the officer's testimony about the weaving, then it shall so state, and may reinstate both its order on the ordinance issue and its judgment of conviction. Then, the issue that Forkes raised will get here anew with the historical findings of fact determined. However, if the trial court finds that the weaving was a justifiable reason to stop the vehicle, and enters its order thereon, then Forkes will have to go from there.

By the Court.—Judgment and order reversed and cause remanded with directions.

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