

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP953-CR

Cir. Ct. No. 2008CT208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICIA J. COURCHAINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County:
JOHN P. HOFFMANN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Patricia Courchaine appeals a circuit court judgment convicting her of a third drunk driving offense. She challenges the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

circuit court's determination that there was reasonable suspicion for the stop that led to her arrest. I affirm the judgment.

Background

¶2 The officer who stopped Courchaine testified to the following facts. At approximately 11:00 p.m., a vehicle caught the officer's attention because it was not driving in a straight line. When the officer first saw the vehicle, it was near the intersection of 7th Street and Main Street in the City of Clintonville. He began following the vehicle as it continued on Main Street.

¶3 Just after the 8th Street and Main Street intersection, there is a curve. Before that curve, between 7th Street and 8th Street, the officer observed the vehicle veer about three times from the curb to the center line. These "deviations" were "very prominent," about fifteen feet.²

¶4 After the curve, the vehicle deviated within its lane two more times, about five or six feet. At one point, it veered toward the center line as an oncoming vehicle approached. The officer observed no reasonable explanation for the path the vehicle was taking.

¶5 As the vehicle approached the 12th Street intersection, it came to a complete stop at a flashing yellow light. The officer decided to stop the vehicle, and he activated his squad car's onboard camera. The driver of the vehicle was Courchaine.

² The officer uses the concepts of veering and deviating interchangeably, and Courchaine does not distinguish between the two concepts. Accordingly, I have assumed for purposes of this decision that the concepts refer to similar driving behaviors.

¶6 According to the officer, his squad camera records and “dumps” footage continuously, but, when he “activates” the camera, it saves the footage beginning sixty seconds before activation. A copy of the video footage was received in evidence, and the circuit court viewed the available footage leading up to the stop. The officer testified that the video started recording near the 8th Street curve and that the prominent veering he observed occurred prior to the first sixty seconds of recorded footage.

¶7 The circuit court found that the officer had reasonable suspicion to stop Courchaine. Courchaine subsequently raised the question of whether the officer’s testimony and video were inconsistent. After reviewing the officer’s testimony and the video, the court found that the officer began observing the vehicle at 7th Street, that the video does not show Courchaine’s vehicle before 9th Street, and that the video does not show the prominent weaving the officer initially observed. Additional facts are referenced as needed below.

Discussion

¶8 Reasonable suspicion is a common sense test based on the totality of the circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The question is what would a reasonable police officer suspect in light of his or her training and experience. *Id.* When reviewing a reasonable suspicion determination, this court upholds the circuit court’s findings of historical fact unless they are clearly erroneous. *See id.*, ¶8. The application of constitutional principles to those facts is reviewed *de novo*. *Id.*

¶9 It is undisputed that the video in this case does not show the initial, prominent veering that the officer testified he observed. Courchaine asserts that the officer’s testimony and the video are inconsistent, and that all of her driving

would have appeared on the video. Her argument seems to be that, as a consequence of this inconsistency, the circuit court could not consider the officer's testimony about prominent veering because that testimony was not credible.

¶10 Courchaine's argument is, in effect, a challenge to certain circuit court fact findings. I reject this challenge because the pertinent findings are not clearly erroneous.

¶11 As already indicated, the circuit court found that the officer began observing Courchaine's vehicle at 7th Street, that the video does not show Courchaine's vehicle before 9th Street, and that the video does not show the prominent weaving the officer observed. These findings are supported by portions of the officer's testimony in combination with the video. The officer testified that there is a curve just after 8th Street and that he observed the prominent veering between 7th Street and 8th Street, before the curve. Consistent with that testimony, the video begins with footage of a curve in the road, then depicts Courchaine's vehicle coming into view and traveling no more than three blocks before reaching a flashing yellow light. The officer testified that this light was at 12th Street, and Courchaine concedes that it is five blocks between 7th Street and 12th Street. Based on all of this evidence, the circuit court reasonably found that the officer began observing Courchaine's vehicle at 7th Street, that the video does not show Courchaine's vehicle before 9th Street, and that the video does not show the prominent weaving that the officer testified he observed.

¶12 The inconsistency to which Courchaine refers arises from the officer's testimony that he activated his camera at 12th Street and that the camera retains sixty seconds of footage before activation. The video, which has a timer, shows the officer reaching 12th Street at about the thirty-two-second mark, not the

sixty-second mark as might be expected given this portion of the officer's testimony. However, the circuit court resolved this inconsistency by crediting the other evidence I have described. See *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989) ("The fact finder ... not only resolve[s] questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony."). Stated another way, the circuit court's express findings imply an additional finding that the officer must have been mistaken about the moment he activated his camera or about the length of footage the camera retains when he activates it.

¶13 Courchaine may also be arguing that, even when the prominent veering is considered, the totality of the circumstances is insufficient to constitute reasonable suspicion of impaired driving. If so, I disagree. Courchaine's prominent veering, while significant on its own, was also followed by additional veering, including one instance in which she veered toward an oncoming vehicle. In addition, Courchaine came to a complete stop at a flashing yellow light when nothing in the record suggests a legitimate reason for doing so. The officer testified that these were all driving behaviors that he associated with alcohol impairment. Finally, the time was approximately 11:00 p.m. When all of these facts are taken together, they are sufficient to provide reasonable suspicion of impaired driving. Cf. *Post*, 301 Wis. 2d 1, ¶¶2, 27-37 ("weaving within a single traffic lane does not alone" constitute reasonable suspicion for a traffic stop, but stop was justified when a vehicle was initially "canted" into a parking lane and repeatedly weaved approximately ten feet within its lane over the course of two blocks at 9:30 p.m.).

¶14 Courchaine argues that there was an innocent explanation for at least some of her driving behavior. In particular, she points to her testimony that she

veered at least once because she was trying to avoid a commotion on the side of the road. Courchaine's explanation for her driving behavior, however, was not apparent to the officer who stopped her, and the police "are not required to rule out the possibility of innocent behavior before initiating a brief stop." *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). Moreover, the circuit court found that Courchaine's testimony was not credible.

¶15 Courchaine also argues that none of her individual driving behaviors violated any law. That is not the test. "[D]riving need not be illegal in order to give rise to reasonable suspicion." *Post*, 301 Wis. 2d 1, ¶24. The question here is whether, considering the totality of the circumstances, the officer could reasonably suspect impaired driving. I have concluded that he could.

By the Court.—Judgment affirmed.

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

