

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2012

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. 2011AP1214-CR

Cir. Ct. No. 2010CT1044

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIZABETH C. EMMENEGGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
NICHOLAS McNAMARA, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Elizabeth C. Emmenegger appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

offense, in violation of WIS. STAT. § 346.63(1)(a). She contends the police officer did not have reasonable suspicion to stop her vehicle and therefore the circuit court erred in denying her motion to suppress the evidence from the traffic stop. We conclude the officer had reasonable suspicion for the traffic stop. We therefore affirm the judgment of conviction.

BACKGROUND

¶2 The following facts are undisputed. Sergeant Bernard Gonzalez observed Emmenegger driving down East Washington Avenue toward the State Capitol at approximately 1:30 a.m. on a Monday in May 2010. At the suppression hearing, Sergeant Gonzalez testified about the observations he made regarding the movement of Emmenegger's vehicle, and a video of the incident was played for the court.

¶3 Sergeant Gonzalez testified that he first noticed Emmenegger's vehicle when, after lawfully changing lanes from the center lane to the left lane, Emmenegger's vehicle drifted toward the far left of the lane, near the curb, and then drifted toward the far right of the lane, near the dotted white line. This initial observation prompted Sergeant Gonzalez to continue to observe the vehicle, and he activated his squad car video camera.

¶4 Sergeant Gonzalez followed Emmenegger's vehicle for about two minutes, covering a distance of 1.1 miles, before he stopped Emmenegger. During this time, Sergeant Gonzalez observed Emmenegger drift toward the far left side of the lane four additional times, and drift toward the far right side of the lane one

more time. Sergeant Gonzalez described the drift as “continuous,” and stated that it was not “jerky.”²

¶5 Sergeant Gonzalez also testified to the driving conditions that morning. He explained that traffic was light, the roadway is “relatively straight,” and it was “clear and dry.”

¶6 Sergeant Gonzalez testified that, based upon his experience as a police officer, he believed that the amount and extent of the drifting he observed was out of the ordinary. Sergeant Gonzalez acknowledged that “[m]ovement within a lane is not unusual.” However, Sergeant Gonzalez testified that in this case, where he had followed the vehicle over a “period of time, in this case two minutes, over that distance ... about a mile, that all those little different movements led [him] to believe that this driver was impaired.”

¶7 Emmenegger moved to suppress all evidence stemming from the stop on the ground that Sergeant Gonzalez did not have reasonable suspicion for the stop. The circuit court denied the motion after considering the totality of the circumstances in this case. The court found that Emmenegger was not speeding and used her turn signal appropriately. However, the court also found that the driving occurred at 1:30 in the morning, “which is approaching what’s commonly known as bar time.” The court observed the video of the incident taken from the

² Sergeant Gonzalez also testified that he estimated the total distance of the drift, from the left side of the lane to the right side of the lane, to be approximately four-and-a-half to five feet. Emmenegger argued to the circuit court and again argues in her brief on appeal that this estimate is inaccurate because Sergeant Gonzalez used a website to estimate the width of Emmenegger’s vehicle when estimating the distance of the drift, and the estimate from the website, according to Emmenegger, is inaccurate. The circuit court did not refer to the width of the drift as a factor it considered when making its decision on whether Sergeant Gonzalez had reasonable suspicion for the stop. We conclude it is unnecessary to consider this issue.

squad car video camera and credited Sergeant Gonzalez' description of the movement of Emmenegger's vehicle. The court stated that Sergeant Gonzalez was "specific in articulating the matter of the drift. He has not exaggerated that. He has been articulate and specific in describing the number of times and the motions that the car made."

¶8 Emmenegger pled no contest to the charge of operating while intoxicated as a second offense. She now appeals from the judgment of conviction on the ground that the circuit court erred in denying her motion to suppress.

DISCUSSION

¶9 Emmenegger contends that Sergeant Gonzalez did not have reasonable suspicion for the stop. In support of her argument, Emmenegger cites *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. There, the supreme court refused to adopt a bright-line rule that "repeated weaving within a single lane provides the reasonable suspicion necessary to justify a traffic stop." *Id.*, ¶¶1-2. Instead, the court determined that the reasonable suspicion inquiry must be based upon the totality of all the facts and circumstances known to the officer. *Id.*, ¶26. Emmenegger contends that the facts and circumstances here do not give rise to reasonable suspicion because the vehicle's movement within the lane was "slow and smooth, not sudden, erratic or jerky," she never moved out of her lane, and she did not exceed the speed limit or violate any other traffic laws.

¶10 The State responds that the totality of the circumstances is sufficient to create a reasonable suspicion that the driver of the vehicle was impaired. In support of its assertion, the State notes that Sergeant Gonzalez, a police officer with experience working on traffic patrol, testified that the driving was unusual. The State explains that Sergeant Gonzalez observed the defendant for "a longer

period of time because it is not unusual for a driver to have an isolated incident which causes a driver to drift in their lane,” but this was not an isolated incident because the drifting occurred multiple times. Furthermore, the State argues, the driving occurred at 1:30 a.m., near bar time, and no other explanation for the manner of driving was evident from the traffic or road conditions that evening.

¶11 A traffic stop is a seizure within the Fourth Amendment; however, it is permissible if the officer has grounds to reasonably suspect that a traffic violation has been or will be committed. *See State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). The test of reasonable suspicion is an objective one, taking into consideration the totality of the circumstances, and must be a suspicion “grounded in specific articulable facts and reasonable inferences from those facts.” *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citations omitted). We uphold the circuit court’s findings of fact unless they are clearly erroneous. *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). Whether the facts meet the constitutional requirement of reasonableness under the Fourth Amendment is a question of law, which we review de novo. *Gaulrapp*, 270 Wis. 2d at 604.

¶12 We conclude the observations by Sergeant Gonzalez described in his testimony are sufficient to permit a reasonable officer to reasonably suspect that Emmenegger was driving under the influence of an intoxicant.

¶13 On direct examination, Sergeant Gonzalez was asked if, based on his experience as an officer, he believed the amount and extent of the drifting was out of the ordinary. Sergeant Gonzalez answered, “Yes, most definitely.” Sergeant Gonzalez explained his reasoning as follows:

Well, I followed it for a mile. I wanted to give it plenty of time to I wanted to see if this was just an isolated incident where perhaps a driver were to drop something on the floor, reach down and pick it up, and then correct whatever irregularity the vehicle may have done, it was over the course of time, and the mile where I saw enough of this drifting to lead me to believe that this was not ordinary, ordinary drivers don't drive like this. And it was at the, when we got near Octopus [Car] Wash that I became concerned that the driver was possibly impaired.

This testimony shows that Sergeant Gonzalez accepted the notion that a vehicle's drifting within its lane could have innocent explanations. *See Post*, 301 Wis. 2d 1, ¶20. However, Sergeant Gonzalez testified that repeated drifting within a lane is not ordinary and that it was this unusual manner of driving that made him suspect the driver was impaired.

¶14 In addition to his testimony regarding the vehicle's movements, Sergeant Gonzalez also testified regarding the driving conditions he observed that morning. Specifically, he testified that the road was dry, clear, and relatively straight, and that the traffic on the road was light. He did not identify any road or weather condition that would cause a vehicle to drift within the lane.

¶15 The training and experience of Sergeant Gonzalez is another factor to consider in the totality of the circumstances equation. *See State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999). Sergeant Gonzalez testified that he had worked for the Madison Police Department for approximately eleven years. He also testified that he had been a police officer with the City of Milwaukee for approximately eight years before he joined the Madison Police Department. Sergeant Gonzalez testified that about fifteen to sixteen of his nineteen years of experience as a police officer had been dedicated to predominantly street patrol and traffic.

¶16 Another factor to consider is the timing of the occurrence. *See Post*, 301 Wis. 2d 1, ¶36. Here, Emmenegger was driving at 1:30 in the morning. The supreme court in *Post* noted that the fact that poor driving takes place “at or around ‘bar time,’” lends further credence to an officer’s suspicion that the driver is driving while intoxicated. *Id.*

¶17 While any one of these facts, standing alone, might be insufficient to constitute reasonable suspicion, “such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn.” *Id.*, ¶37. Here, the vehicle’s repeated drifting within the lane, coupled with the time of night and the officer’s experience in traffic patrol, as well as the fact that the road was dry, clear, and relatively straight, and traffic was light, gives rise to a reasonable suspicion that the driver of the vehicle was under the influence of an intoxicant.

CONCLUSION

¶18 The judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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

