COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1282

Cir. Ct. Nos. 2011TR7382
2011TR7432

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RAENOLD QUILES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] The State of Wisconsin appeals from a judgment vacating Raenold Quiles's conviction for operating a vehicle while

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

under the influence of an intoxicant (OWI) and operating a vehicle with a prohibited alcohol concentration (PAC). Before trial, Judge Patrick C. Haughney denied Quiles's motion to suppress for lack of reasonable suspicion. After a jury trial and guilty verdicts, Judge J. Mac Davis, substituting for Judge Haughney, granted Quiles's motion for reconsideration on the motion to suppress and dismissed the judgment against Quiles. The State contends the stop of Quiles's vehicle was supported by reasonable suspicion and, therefore, the trial court erred in vacating Quiles's conviction. We affirm the trial court judgment dismissing the case against Quiles.

BACKGROUND

¶2 The trial court, Judge Haughney presiding, held a hearing on Quiles's motion to suppress. Trooper Thomas McKay of the Wisconsin State Patrol testified regarding his stop of Quiles's vehicle. McKay's written narrative report of the stop indicated that on September 4, 2011, at about 12:15 a.m., McKay was travelling east on I-94 in the center lane when he observed Quiles's vehicle. McKay testified at the pretrial suppression hearing that he saw Quiles's vehicle ahead of him in the right lane, drifting on and off and over the fog line "multiple" times. McKay initiated a traffic stop, smelled intoxicants in Quiles's vehicle, administered field sobriety tests and ultimately arrested Quiles for driving while under the influence of intoxicants. While McKay mentioned the video of the stop, the video was not introduced into evidence. Based on McKay's testimony, Judge Haughney denied Quiles's motion to suppress.

¶3 The case proceeded to a jury trial, with Judge Davis presiding, as Judge Haughney was out on medical leave. At trial, the video of the stop was

introduced into evidence. The jury found Quiles guilty of OWI and operating with a PAC.

¶4 After trial, Quiles moved for reconsideration of the previous ruling on reasonable suspicion.[2] Judge Davis granted the motion, stating that while he had not heard the testimony from the original suppression motion, he had read McKay's previous testimony, had heard McKay's trial testimony, and had seen the video from McKay's vehicle. Judge Davis noted, "All we have here is wandering over to and touching the fog line for a bit. The video doesn't seem to show that it's particularly remarkable or notable. Everything else in the video … shows smooth, normal driving that one might expect." Judge Davis found that the video, the transcript and what he heard at trial "don't meet the State's burden of proof of showing that there was a reasonable suspicion for the stop."

DISCUSSION

¶5 The State's challenge on appeal is limited to the trial court's finding that McKay did not have reasonable suspicion to stop Quiles. "Whether there was … reasonable suspicion to conduct a stop is a question of constitutional fact, which is a mixed question of law and fact to which we apply a two-step standard of review." ***State v. Anagnos***, 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675. First, we review the trial court's findings of fact under the clearly erroneous standard. ***Id.*** Second, we review de novo the application of those historical facts to the constitutional principles. ***Id.*** Finally, when the evidence in the record consists of disputed testimony and a video recording, we apply the clearly

[2] Quiles's motion had various titles and requests for relief, but it was treated by Judge Davis as a motion for reconsideration on the reasonable suspicion ruling.

erroneous standard of review to the trial court's findings of facts based on the record. ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898, *review denied*, 2011 WI 100, 337 Wis. 2d 51, 806 N.W.2d 639.

¶6 WISCONSIN STAT. §968.24 permits a law enforcement officer to temporarily detain a person for the purpose of limited investigation when the officer reasonably suspects that the person may have committed, is committing, or is about to commit an offense. ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). To execute a valid investigatory stop, the officer must reasonably suspect, in light of his or her experience, that criminal activity is afoot. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Such reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** (citation omitted). This is a "common sense" test, ***id.*** at 139-40, and police officers are not required to rule out the possibility of innocent behavior before initiating a temporary detention. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). In other words, "[t]he reasonableness of a stop is determined based on the totality of the facts and circumstances." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶7 Quiles contends that "[t]he crossing of the right wheels of Quiles'[s] truck over the 'fog line' was the only fact on which the trooper based his decision to stop and search." Thus, Quiles argues that because he did not commit any violation by crossing the fog line and because the only factor McKay considered in stopping Quiles was Quiles's crossing the fog line, McKay did not have the requisite reasonable suspicion to stop and detain Quiles.

¶8 We briefly address Quiles's argument, but ultimately affirm on other grounds. The supreme court recently addressed reasonable suspicion based on legal driving in ***Anagnos***, stating that "[a]n investigative traffic stop may be supported by reasonable suspicion even when the officer did not observe the driver violate any law." ***Anagnos***, 341 Wis. 2d 576, ¶47. In addressing this issue, the supreme court further noted the reasoning in ***Post***, that "'driving need not be illegal in order to give rise to reasonable suspicion' because such a standard 'would allow investigatory stops only when there was probable cause to make an arrest.'" ***Anagnos***, 341 Wis. 2d 576, ¶47 (quoting ***Post***, 301 Wis. 2d 1, ¶24). The standard for whether an officer has reasonable suspicion to detain someone is not whether a law is broken, but rather whether the officer can "make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." ***Waldner***, 206 Wis. 2d at 57.

¶9 Here, the evidence conflicted as to how many times Quiles crossed the fog line. McKay testified that Quiles crossed onto and over the fog line "several" and "multiple" times. The video recording, on the other hand, does not clearly show that Quiles crossed the fog line prior to the one time right before McKay pulled him over. When asked if the video showed "everything else" he saw other than the horizontal nystagmus gaze test, McKay testified, "Yes." Given the conflicting evidence on whether Quiles crossed the fog line multiple times, we defer to the trial court on this finding of fact. ***Walli***, 334 Wis. 2d 402, ¶17. The trial court found that the video showed no more than "wandering over to and touching the fog line for a bit." This finding is not clearly erroneous. Based on the facts as found by the trial court, there was no reasonable suspicion to stop

Quiles. We affirm Judge Davis's decision to set aside the verdicts and his judgment of dismissal.

By the Court.—Order affirmed.

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