

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2004

Cornelia G. Clark
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. 03-3272-CR

Cir. Ct. No. 03CT001287

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID J. ALLAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ David J. Allain appeals a judgment of conviction for operating a motor vehicle while intoxicated, third offense.² Allain

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Allain was also convicted of operating after revocation, first offense. Allain appeals only the OWI conviction.

contends that the circuit court erred in denying his motion to suppress evidence on the grounds that he committed no traffic violation and the arresting officer had no reasonable suspicion to stop Allain's vehicle. We agree and reverse the circuit court's order.

FACTS

¶2 The controlling facts as established at the suppression hearing are not in dispute. On March 26, 2003, at approximately 1:45 a.m., Dane County Deputy Sheriff Robert Ladik was driving south through the Town of Dunn on Highway 51 in an area where there is only one lane of traffic in each direction. Ladik first noticed Allain's vehicle at Schneider Drive. Ladik followed Allain for approximately seven-tenths of a mile to Charles Lane. As a northbound vehicle passed Allain and Ladik at the Highway 51/Charles Lane intersection, Allain's vehicle moved approximately six inches over the fog line. Allain's vehicle remained outside the fog line for approximately four or five seconds over a distance of approximately 400 feet or one-tenth of a mile. Allain was over the fog line primarily while going around an eastward curve in the highway. Allain returned to his lane and Ladik followed Allain's car for approximately another half mile. Ladik testified Allain did not swerve, cross the fog line, speed or drive erratically.

¶3 Ladik testified that in his nine years experience as a police officer, he had conducted hundreds of traffic stops related to suspicion of intoxicated driving. Based on his training and experience, Ladik believed certain behaviors indicated somebody might be driving under the influence. Ladik believed crossing the fog line constituted a traffic violation and was a signal of reduced alertness and therefore activated his emergency lights to stop Allain's car. When Allain failed to respond to the emergency lights, Ladik then activated his emergency siren.

After three more seconds, Allain began to slowly pull over and Ladik made contact with Allain. Ultimately, Ladik transported Allain to a medical examiner to have his blood drawn. The blood test revealed a blood alcohol concentration of .124 percent. Allain was eventually charged with OWI, third offense, operating a vehicle while having a prohibited blood alcohol concentration, third offense, and operating a motor vehicle while his operating privilege was revoked.

¶4 Allain filed a motion to suppress all the evidence collected after the stop of his vehicle on the ground that he was detained in the absence of reasonable suspicion. Allain argued one instance of crossing the fog line when passed by an oncoming vehicle on a curve did not constitute reasonable suspicion. After a hearing, the circuit court denied the motion. Subsequently, Allain plead no contest to the charges of OWI, third offense, and operating a motor vehicle while his operating privilege was revoked. Allain was sentenced on September 29, 2003. Allain appeals.

STANDARD OF REVIEW

¶5 When reviewing a circuit court's determination regarding the suppression of evidence, we will uphold the circuit court's factual findings unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Here, the facts are undisputed. Whether these facts add up to reasonable suspicion is a question of law we review de novo. See *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

DISCUSSION

¶6 Allain makes two arguments: (1) crossing the fog line for a distance of approximately 400 feet was not a violation of WIS. STAT. § 346.13 and (2) when viewing the totality of the circumstances, the traffic stop was not based

upon reasonable suspicion that a crime was being committed or was about to be committed. Thus, according to Allain, there was no legal basis for the traffic stop.

¶7 The State argues Allain’s deviation over the fog line constituted a violation of WIS. STAT. § 346.13(3). Further, the State argues Ladik had reasonable suspicion to initiate the traffic stop based on the totality of circumstances. The State identifies three elements as constituting reasonable suspicion under the totality of the circumstances: (1) Ladik’s extensive sobriety test experience, (2) the time of day that the stop occurred and (3) the length and distance of the deviation.

¶8 We first review the applicable law pertaining to traffic stops. “The temporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of the Fourth Amendment.” *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citation omitted). Thus to be constitutionally permissible, a stop must be reasonable. *Id.* “When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure.” *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Further, a traffic stop is generally reasonable under the Fourth Amendment when an officer has reasonable suspicion that a traffic violation has been or will be committed. *Gaulrapp*, 207 Wis. 2d at 605.

¶9 Alternatively, where there is no unlawful conduct, a stop may be justified based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct indicate that criminal activity is afoot. *Waldner*, 206 Wis. 2d at 57. As the State contends, it is true that the courts will give deference to reasonable inferences drawn by police officers in light of their experience. *State v. Seibel*, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991).

However, whether an officer had reasonable suspicion is an objective test. *Waldner*, 206 Wis.2d at 56. The suspicion must be “grounded in specific, articulable facts and reasonable inferences from those facts” *Id.* (citation omitted). Whether the facts meet this standard is a question of law we review de novo. *Id.* at 54. The focus is on the totality of the circumstances, not individual facts standing alone. *See id.* at 58.

¶10 Reasonable suspicion does not require that the officer have grounds to issue a traffic citation in order to make a traffic stop. *See id.* at 59. As the *Waldner* court observed, “when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” *Id.* at 60.

¶11 We first address Ladik’s belief that Allain violated WIS. STAT. § 346.13 by crossing the fog line. Ladik believed crossing the fog line constituted a traffic infraction; thus he stopped Allain’s vehicle. However, a stop may not be justified on the ground that the stop was based on a reasonable but mistaken view of the law. *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), *aff’d*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. Wisconsin statutes do not address whether crossing a fog line would constitute a traffic violation. Further, there are no published opinions in Wisconsin addressing whether a driver always violates WIS. STAT. § 346.13 (3)³ by crossing a fog line. Therefore, we conclude

³ WISCONSIN STAT. § 346.13 addresses driving on roadways laned for traffic and states

Whenever any roadway has been divided into 2 or more clearly indicated lanes, including those roadways divided into lanes by clearly indicated longitudinal joints, the following rules, in addition to all others consistent with this section, apply:

(continued)

there was no reasonable suspicion to stop and detain Allain on the basis that he committed a traffic infraction under Wisconsin statutes.

¶12 However, Ladik’s subjective intent is irrelevant so long as there is a proper legal basis to justify a traffic stop. *See State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987.) Therefore, if in light of the totality of the circumstances a reasonable police officer would have reasonably suspected Allain was engaging in illegal conduct, then Ladik’s traffic stop may be justified on the ground that reasonable suspicion existed to detain Allain for further inquiry. “The question of what constitutes reasonableness is a common sense test.” *Waldner*, 206 Wis. 2d at 56.

¶13 The State claims this case is not unlike *Waldner* where the court found reasonable suspicion existed based on a number of innocent facts. The *Waldner* defendant was driving slowly through town at 12:30 a.m. *Waldner*, 206 Wis. 2d at 53. Waldner stopped his car briefly at an intersection with no stop sign or light. *Id.* Waldner then turned onto a cross-street and accelerated at a high rate of speed. *Id.* Finally, Waldner pulled into a legal streetside parking space, opened his door and poured a mixture of ice and liquid onto the roadway. *Id.* The police officer acknowledged Waldner had broken no laws but believed the facts were suspicious. *Id.* The *Waldner* court stated

Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable

....

(3) Notwithstanding sub. (2), when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.

inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. That is what we have here. These facts gave rise to a reasonable suspicion that something unlawful might well be afoot.

Id. at 58.

¶14 Here, the totality of what Ladik observed does not rise to the level of reasonable suspicion that the driver was somehow impaired. Consequently, Ladik did not have the right to temporarily detain Allain for the purpose of inquiry. The facts of this case can be distinguished from *Waldner*. Unlike *Waldner*, there were very few individual facts adding up to reasonable suspicion justifying further inquiry under an objective standard. In this case, Allain crossed the fog line only once for approximately four seconds, Allain's deviation over the fog line occurred at 1:45 a.m. and Ladik is experienced in detecting impaired driving. While there is no bright line rule between reasonable suspicion and no reasonable suspicion, the facts in light of the totality of the circumstances here are just too thin and do not add up to reasonable suspicion under an objective standard.

¶15 Further, there are additional facts under the totality of the circumstances that lessen the suspicious nature of Allain's driving. Allain crossed the fog line when meeting the headlights of an oncoming car on a one-lane highway. He remained over the fog line primarily around an eastward curve. This is hardly an example where there was no legitimate reason to cross the fog line. While Ladik was not required to rule out innocent explanations for driving behavior prior to initiating a stop, *see id.* at 59, the facts viewed objectively do not allow a reasonable inference that unlawful conduct was afoot.

¶16 The circuit court cited the time of day as a factor contributing to the totality of the circumstances. In *State v. Allen*, 226 Wis.2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999), the court stated the time of day is another factor in the totality of the circumstances equation. Further, *Allen* cites *State v. Young*, 212

Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997), for the proposition that the training and experience of an officer is another factor to consider under the totality of the circumstances. *Allen*, 226 Wis. 2d at 74. However, *Allen* still maintains each of these factors are just one “building block” in the totality of the circumstances equation developed in *Waldner*. *Allen*, 226 Wis. 2d at 75-76. In this case, there are not enough “blocks” to support an objective determination of reasonable suspicion that Allain was violating or was about to violate the law.

¶17 In sum, we conclude there was no reasonable suspicion to stop and detain Allain’s vehicle. The circuit court erred in denying Allain’s motion to suppress evidence based upon lack of reasonable suspicion in detaining Allain’s vehicle. We therefore reverse the judgment of the circuit court.

By the Court.—Judgment reversed.

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

