COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP414-CR **Cir. Ct. No. 2008CT173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFERY N. JARDEEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed*; *attorney sanctioned.*

¶1 PETERSON, J.[1] Jeffery Jardeen appeals a judgment of conviction for operating while intoxicated, third offense. Jardeen argues the arresting officer

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

lacked reasonable suspicion to initiate the traffic stop. We affirm. We also sanction Jardeen's attorney, Andrew Mishlove, for filing a deficient appendix to his brief and falsely certifying that the appendix conformed to the requirements of WIS. STAT. RULE 809.19(2)(a).

BACKGROUND

¶2 Shortly after 11:00 p.m. on July 7, 2008, deputy William Swanson observed a vehicle weaving within its own traffic lane. Swanson initiated a traffic stop and determined the driver, Jardeen, was operating while under the influence. A blood draw confirmed Jardeen's blood alcohol concentration was .197.

¶3 Jardeen moved to suppress all evidence obtained from the traffic stop, arguing Swanson lacked reasonable suspicion to stop him. At the motion hearing, Swanson testified he had four years of experience and had been trained to detect drunk drivers. He testified that although Jardeen stayed between the fog line and the centerline, he weaved "completely … from one side of the lane to the other, back and forth, and did this multiple times" for about half a mile. Swanson testified Jardeen's weaving was excessive and erractic, and that he believed "the vehicle would leave the roadway if it continued …." When asked to clarify what about Jardeen's driving was erratic, Swanson responded:

> I felt that the speed of the weave from side to side was faster than … somebody who just doesn't drive straight. That's what got my attention. I considered it erratic. It wasn't where somebody was necessarily jerking the wheel that would cause the vehicle to rock. I've seen that as well, but just the speed that he was bouncing back and forth between the two lines.

¶4 The court denied Jardeen's motion. It concluded that in light of Swanson's training and experience, his observation of Jardeen weaving quickly

from one side of his lane to the other multiple times at 11:00 in the evening provided reasonable suspicion to initiate the stop.

DISCUSSION

¶5 A police officer may initiate an investigatory traffic stop if "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. Whether a stop is reasonable is a question of constitutional fact. ***Post***, 301 Wis. 2d 1, ¶8. We review questions of constitutional fact under a mixed standard of review, upholding the circuit court's findings of fact unless clearly erroneous, but reviewing independently the application of these facts to the constitutional standard. ***Id.***

¶6 Jardeen argues our state supreme court's decision in ***Post*** compels the conclusion his weaving did not provide Swanson with reasonable suspicion to stop him. We disagree.

¶7 In ***Post***, a police officer stopped Post after watching him "traveling in a smooth 'S-type' pattern" for two blocks within an extra wide traffic lane at 9:30 p.m. ***Id.***, ¶¶5, 36. The court held that "weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop." ***Id.***, ¶2. But it affirmed "that courts must determine whether there was reasonable suspicion for an investigative stop based on the totality of the circumstances." ***Id.***, ¶26. The court then concluded, under the totality of the circumstances, there was reasonable suspicion for the stop, pointing to the width and frequency of Post's weaving, as well as the time the incident took place. ***Id.***, ¶¶35-36.

¶8 Here too, the totality of the circumstances provided Swanson with reasonable suspicion to initiate a traffic stop. Swanson testified about his training and experience detecting drunk drivers, and testified he had seen weaving like Jardeen's "multiple times before [and] usually it indicates intoxication, a medical problem, or a vehicle problem." Swanson testified the speed Jardeen was weaving within his lane was unusual, that Jardeen was "bouncing back and forth between the two lines," and that it was this quick weaving within the lane that got his attention. The circuit court found this testimony credible, finding:

> [Jardeen weaved] quickly back and forth. [Swanson] described it as erratic. And that is what really alerted him and indicated to him … that there was a problem. This isn't the gentle S pattern that the court was faced with in ***Post***. It's something more erratic than what they were dealing with in that case.

Finally, as in ***Post***, the time of the incident, 11:10 p.m., while not as significant as if it had occurred around "bar time," lends further credence to Swanson's suspicion Jardeen was intoxicated. *See* ***id.***, ¶36.

JARDEEN'S APPENDIX

¶9 Jardeen's counsel, Andrew Mishlove, filed a deficient appendix with Jardeen's brief. WISCONSIN STAT. RULE 809.19(2)(a) requires an appellant's brief to "include a short appendix containing, at a minimum, the findings or opinion of the circuit court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues." The appendix Mishlove filed simply contains a photocopy of the judgment of conviction. "[A] judgment … does not begin to tell us how the trial judge decided an issue of importance to the appellate litigant." ***State v. Bons***, 2007 WI App 124, ¶27, 301

Wis. 2d 227, 731 N.W.2d 367 (Brown, J. concurring). Nor could we discern much about what happened at the motion hearing from the brief Mishlove submitted; nowhere does the brief mention what Jardeen was charged and convicted of, much less any factual findings or legal conclusions the circuit court made on the motion to suppress. *See* WIS. STAT. RULE 809.19(1)(d). The requirement that parties file an adequate appendix "is not designed … to annoy attorneys or to put them to unnecessary trouble in the preparation of their appeals. An insufficient appendix deprives opposing counsel and the court of a much-needed aid in their consideration of the appellant's contentions." ***Reserve Supply Co. v. Viner***, 9 Wis. 2d 530, 534, 101 N.W.2d 663 (1960).

¶10 Moreover, Mishlove's certification states:

> I hereby certify that filed with this brief … is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

An appendix containing nothing more than the judgment clearly does not contain these items. A certification that it does is false. Filing a false certification with this court not only violates WIS. STAT. RULE 809.19(8)(d); it also violates SCR 20:3.3(a) (2006), which provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal." ***Bons***, 301 Wis. 2d 227, ¶24. Accordingly, we sanction Mishlove and direct that he pay the clerk of this court $150 within thirty days of the release of this opinion. *See* WIS. STAT. RULE 809.83(2).

By the Court.—Judgment affirmed; attorney sanctioned.

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