

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2010

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. 2009AP1799-CR

Cir. Ct. No. 2008CF1317

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER M. MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. After his pretrial motion to suppress evidence was denied, Javier M. Martinez pled guilty to possessing more than 10,000 grams of

marijuana with the intent to deliver, contrary to WIS. STAT. § 961.41(1m)(h)5. (2007-08).¹ Martinez appeals, arguing that the trial court erroneously denied his suppression motion because there was no valid basis for the traffic stop and the stop was unreasonably extended. Because we conclude that the trial court's findings of fact are not clearly erroneous and support the suppression decision, we affirm the judgment of conviction.

BACKGROUND

¶2 Martinez was pulled over for a traffic stop and consented to the search of his vehicle. The drugs at issue were found in Martinez's trunk. He moved to suppress evidence of the drugs on grounds that there was not a valid basis for the stop, the stop became unreasonable as it continued and Martinez's consent to search the trunk was invalid.

¶3 At the suppression hearing, Milwaukee County Sheriff's Department Deputy Brad Lessila testified as follows. At 8:53 p.m., he was dispatched to look for a possible intoxicated or impaired driver operating a white Toyota with a New Mexico license plate on the expressway near the Marquette Interchange. As he drove he "ran the plate" and learned "that the vehicle was listed to a rental company." Lessila saw the vehicle, which was driving in the middle lane of traffic, and followed it.

¶4 Lessila observed the vehicle "for between a half mile and one mile." He saw the Toyota twice cross about one foot into the left lane and then return to

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the middle lane, without signaling a lane change. Based on these lane deviations, Lessila pulled the Toyota over.

¶5 Lessila spoke with Martinez, who was the only occupant in the vehicle. Lessila asked him for his driver's license and Martinez provided either a license or identification card from New Mexico. Lessila asked Martinez where he was going and Martinez said he was driving from New Mexico to see his aunt in Madison, Wisconsin. Lessila said he asked Martinez if he was tired, noting that Martinez had been deviating from his lane. Martinez "said he was a little tired."

¶6 While Lessila was talking to Martinez, he saw the rental car agreement in Martinez's lap and asked if he could see it. Martinez gave the agreement to Lessila, who read it and learned that Martinez was not listed as an authorized driver on the agreement. Martinez told Lessila that the person listed on the rental agreement had given Martinez permission to drive the vehicle. Martinez said he was not aware that he could not operate a vehicle that was not rented to him.

¶7 Lessila's observations of Martinez did not lead him to believe that Martinez was intoxicated. However, given Lessila's drug interdiction training, he became suspicious that Martinez might be a drug courier, based on the following facts: Martinez was driving a rental car from a "source state," he was not listed on the rental agreement and he had a new United States map and a bag in the back seat. Lessila asked Martinez if he could "take a look in the vehicle," and Martinez replied, "Yeah, no problem."

¶8 Lessila asked Martinez "to pop the trunk," which Martinez did. After conducting a brief frisk of Martinez and asking him to stand by the median wall, Lessila looked in the trunk and saw a black duffel bag and suitcase. Lessila

asked what was in the bags and Martinez indicated they contained “clothes and stuff.” Lessila opened the duffel bag and “saw coffee grounds on top of ... tan colored bricks,” which Lessila believed contained drugs. Lessila testified that “[l]ess than five minutes” passed from the time he made contact with Martinez to the time he found the drugs in the trunk. Lessila arrested Martinez and ticketed him for deviating from his designated lane. *See* WIS. STAT. § 346.13(3).

¶9 Martinez also testified at the suppression hearing. He said he had left New Mexico at 6 p.m. the day before he was stopped in Milwaukee and had driven most of the time, stopping only to refuel and, on one occasion, sleep for three hours. Martinez said he was not aware that the vehicle behind him was a sheriff’s vehicle until he was pulled over. He said that even though he had been driving for a long time with little sleep, he “was well aware of what I was doing when I was driving” and had not drifted into another lane.

¶10 Martinez’s testimony concerning what occurred when Lessila started talking with him was generally consistent with that of Lessila. However, Martinez said Lessila did not mention any lane deviation. Martinez said that Lessila asked him if he had anything illegal in the car and Martinez told him no. Martinez said Lessila then asked to search the vehicle and Martinez told him, “Sure.” On cross-examination, Martinez agreed that at no point did he ever tell Lessila that Lessila could search his car but not the trunk. Martinez said that after he was pulled over, he did not feel that he was free to leave at any point.

¶11 The trial court denied Martinez’s suppression motion. It explicitly found Lessila’s testimony to be credible and accepted the deputy’s version of events. It found that Lessila had seen Martinez deviate from his lane twice, crossing one foot into the left lane, without using his turn signal. Based on that

finding, the trial court concluded that Lessila had probable cause to stop Martinez's vehicle because Lessila had observed a traffic violation. The trial court also concluded that Martinez was legally seized at the time he gave consent for Lessila to search the vehicle, and it found that Martinez's consent was voluntarily given.

¶12 Martinez subsequently entered a guilty plea and was convicted. Martinez was sentenced to five years of initial confinement and five years of extended supervision. This appeal follows.

DISCUSSION

¶13 Martinez, who does not challenge the trial court's findings of fact, argues that his suppression motion should have been granted for two reasons: (1) the deputy lacked reasonable suspicion to stop Martinez based on two one-foot lane deviations; and (2) once the deputy determined that Martinez was not operating under the influence, his further questioning of Martinez "was an unreasonable extension of the initial stop."² We consider each issue in turn.

I. Validity of the stop.

¶14 Martinez argues that neither the anonymous tip concerning Martinez's driving nor the deputy's observations of two lane deviations provided

² In its response brief, the State asserted that on appeal Martinez has not pursued his argument that his consent was involuntary, choosing to focus instead on his argument that his consent was invalid because Lessila impermissibly extended the traffic stop. Martinez did not refute the State's assertion in his reply brief, and we agree that he has not argued the voluntariness issue on appeal. That issue is therefore abandoned. See *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned); *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

reasonable suspicion to support an investigatory stop. In response, the State argues that the stop was valid because “Lessila had probable cause to stop Martinez for a traffic violation that he personally observed.” (Emphasis omitted.) We agree with the State.

¶15 “Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact.” *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. “A finding of constitutional fact consists of the [trial] court’s findings of historical fact, which we review under the ‘clearly erroneous standard,’ and the application of these historical facts to constitutional principles, which we review de novo.” *Id.* (citation omitted). *Popke* held that “[a]n officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred.” *Id.*, ¶13. *Popke* concluded that there was probable cause to believe a traffic violation had occurred where the driver’s car “‘swerved’ into the left lane of traffic and that resulted in the defendant’s vehicle being three-quarters left of the center of the road.” *Id.*, ¶¶16-17 (citing WIS. STAT. § 346.05, which prohibits operating left of center).

¶16 Similarly, in this case the trial court found—and Martinez no longer disputes—that Lessila observed Martinez’s vehicle as it crossed one foot into the left lane twice, without signaling a lane change. Based on that observation, Lessila had probable cause to stop Martinez for deviating from his designated lane. *See* WIS. STAT. § 346.13(3).³

³ WISCONSIN STAT. § 346.13(3) provides that “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.”

¶17 Martinez disagrees with this analysis. He argues that “two minor deviations of about one foot over the lane marker in the course of one and a half miles” is insufficient to justify a stop.⁴ He cites as persuasive authority *State v. Tischer*, No. 2009AP992-CR, unpublished slip op. (WI App Jan. 14, 2010), where the court held that there was not reasonable suspicion that a driver was operating while intoxicated where he “‘rode’ the dividing lane on his left but did not cross it.” *See id.*, ¶16. We are not convinced that *Tischer* compels a different result, as *Tischer* did not involve a case where the lane marker was actually crossed, as is the case here. Driving one foot into an adjacent lane provides sufficient probable cause that one has deviated from one’s designated lane of traffic, contrary to WIS. STAT. § 346.13(3).

¶18 For these reasons, we reject Martinez’s challenge to the validity of the traffic stop. Lessila had probable cause to believe that Martinez had committed a traffic violation and, therefore, the stop was valid. *See Popke*, 317 Wis. 2d 118, ¶17.

II. Extension of the initial stop.

¶19 Martinez argues that even if the initial stop was valid, Lessila’s investigation beyond issues related to operating while under the influence “converted the stop to an unreasonable one.” Martinez asserts that once Lessila determined that “Martinez was not intoxicated, he should have terminated the stop.” We are not convinced.

⁴ Martinez refers to observations made over a 1.5-mile distance, while Lessila testified that his observations were made over a distance of “between a half mile and one mile.” This discrepancy does not affect our analysis.

¶20 If an officer, during the course of a valid traffic stop, “becomes aware of suspicious factors or additional information that would give rise to an objective, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter simply because further investigation is beyond the scope of the initial stop.” *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. As the State points out in its brief, Lessila became aware of numerous facts during the course of his investigation of Martinez’s driving that gave “rise to an objective, articulable suspicion that criminal activity [was] afoot.” *See id.* For instance, Lessila learned that Martinez was driving a rental car for which he was not an authorized driver, was driving from a source state and had a new map and bag in the back seat of his car. In his reply brief, Martinez offers no argument with respect to the State’s assertion that these facts provided reasonable suspicion to continue the stop. The State’s argument is therefore deemed admitted.⁵ *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted). We reject Martinez’s argument that the drugs should have been suppressed based on the continuation of the traffic stop. *See Malone*, 274 Wis. 2d 540, ¶24.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁵ In addition, we agree with the State that this issue is inadequately briefed. Martinez’s argument is a single paragraph long and contains only one case citation. We decline to develop Martinez’s argument for him. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

