

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2010

David R. Schanker
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. 2009AP1912-CR

Cir. Ct. No. 2008CT593

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY J. TADYCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Bradley J. Tadych appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) contrary to WIS. STAT. § 346.63(1)(a), his third offense. He contends that the circuit court erred when it denied his motion to suppress evidence obtained during the investigative traffic stop of his vehicle because the stop was not supported by reasonable suspicion. We disagree and affirm the judgment.

¶2 On June 28, 2008, State Trooper Bryan Ashenbrenner was on duty and traveling along Highway VV in Manitowoc county. He observed a full-size blue Ford pickup truck approaching from the opposite direction. Ashenbrenner saw the truck cross the fog line and “go partially off the paved portion of the roadway.” He explained that the passenger side tires were off the paved portion of the road. At this point of the roadway, there is about ten to twelve inches of gravel shoulder and “then it slopes dramatically down into a ditch.”

¶3 After the truck passed by, Ashenbrenner turned around to follow it. He activated his emergency lights and siren and caught up to the truck. As he approached, he noticed the truck cross the fog line again. Then the truck slowed and pulled over to a stop. Ashenbrenner identified the driver as Tadych. As a result of the investigative stop, Ashenbrenner issued two citations to Tadych, one for OWI and one for operating with a prohibited alcohol concentration.

¶4 Tadych moved to suppress the evidence obtained during the stop. The circuit court held a hearing on December 18, 2008. Ashenbrenner testified to the facts surrounding the stop and the court held that “under the totality of the

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

circumstances here, that is, the observation that a vehicle driving down a county trunk highway, with no other reason to do so, not only has the right side tires cross over the fog line, but go completely off the paved portion,” there was reasonable suspicion for the stop. Tadych pled guilty to his third offense of OWI and the PAC charge was dismissed and read in for sentencing.

¶5 Tadych appeals, arguing that the evidence obtained during the traffic stop should have been suppressed because the stop was not supported by reasonable suspicion. Traffic stops are seizures under the Fourth Amendment and therefore subject to the constitutional imperative that they be reasonable under the circumstances. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). “Whether evidence should be suppressed is a question of constitutional fact.” *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted). The circuit court’s findings of historical fact will be upheld unless found to be clearly erroneous, and we review the application of constitutional principles to the facts de novo. *Id.*

¶6 Certain investigative stops, prompted by an officer’s suspicion that the individual may have committed a crime, are in certain circumstances constitutionally permissible even though the officer lacks probable cause to arrest. *See State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). The reasonable suspicion necessary to detain a suspect for investigative questioning must be grounded in specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action is appropriate. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). “The question of what constitutes reasonable suspicion is a commonsense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her

training and experience?” *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386, 390 (1989).

¶7 Tadych contends that Ashenbrenner did not articulate sufficient facts so as to demonstrate reasonable suspicion that a crime was being committed. Specifically, he argues that Ashenbrenner observed only “gradual” movements of his truck, nothing “sharp, veering or jerky.” Tadych emphasizes that he did not cross the centerline of the two-lane county highway and that the fog line, which he did cross, was “very close to the edge of the pavement—within 2 inches.” He disputes that the movements of his vehicle over the fog line violated WIS. STAT. § 346.13(3), which requires that “when lanes have been marked ... the operator of a vehicle shall drive in the lane designated.” Tadych relies on *State v. Post*, 2007 WI 60, ¶38, 301 Wis. 2d 1, 733 N.W.2d 634, where our supreme court held, “[W]eaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle.”²

¶8 The State counters that Tadych did violate WIS. STAT. § 346.13(3) when he crossed the fog line, which marks the outer edge of the designated lane, and more obviously when he drove onto the gravel shoulder beyond the paved portion of the designated lane. Regardless of whether Tadych violated § 346.13(3), the State directs us to *Post* for the proposition that “driving need not be illegal in order to give rise to reasonable suspicion.” *Post*, 301 Wis. 2d 1, ¶24. Therefore, it is not necessary to demonstrate that Tadych committed a traffic violation. In *Post*, our supreme court also advised that driving need not be erratic

² We note that Tadych incorrectly quotes the supreme court, omitting the word “alone,” to his advantage. We caution counsel to quote our courts and the law with accuracy.

or unsafe to give rise to reasonable suspicion. *Id.* Here, Tadych left his lane of travel twice.³ At one point, he drove with the passenger tires on the gravel shoulder alongside the road. Particularly troubling is the narrowness of the gravel, ten to twelve inches, which buffers the roadway from a steep slope into a ditch. Such driving, if not illegal, was unsafe. The totality of the circumstances supported the investigative stop.

¶9 Based on the record facts, we agree with the circuit court that Ashenbrenner provided specific and articulable facts that demonstrated a reasonable suspicion and led to the traffic stop. Because the investigative stop was therefore constitutional, the circuit court properly denied the motion to suppress evidence. We affirm.

By the Court.—Judgment affirmed.

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

³ In his reply brief, Tadych asserts that the gravel shoulder is “clearly a portion of the road that is included under WIS. STAT. § 346.61 and is considered a portion of the highway and is held open to the public for use of their vehicles.” However, Ashenbrenner’s concern was not that Tadych had left the road, but that he had left his designated lane and further that just past the gravel, the land “slopes dramatically down into a ditch.”

