COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2514-CR **Cir. Ct. No. 2008CT2663**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. OETZMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RICHARD A. CONGDON, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] In ***State v. Waldner***, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996), our supreme court held that when a police officer observes

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

several incidents of driving behavior, each incident of which is lawful standing by itself, the officer may nonetheless stop a vehicle if the cumulative effect of those incidents suggest a reasonable suspicion that the driver is impaired. Brian A. Oetzman claims that his case is qualitatively different than the facts in ***Waldner*** because all of his observed acts were "normal" driving behavior. After reviewing the facts, we conclude that ***Waldner*** is inapplicable. The officer here properly had cause to stop Oetzman because he violated the law—hardly an innocent act. Oetzman also claims that, at a trial to determine whether he was driving while intoxicated, as a condition precedent to the presumption of admissibility of the intoximeter result, the State must either read the informing the accused form into the record or the form itself must be offered or received into evidence. We hold that this is not the law. We affirm.

¶2 On October 30, 2008, at approximately 12:18 a.m., a City of Muskego police officer observed a black pick-up truck stopped in an eastbound direction on State Highway 36 at the intersection of North Cape Road. Highway 36 is a divided highway and, at the intersection, there is a left-turn lane, a right-turn lane, and an eastbound lane. The truck was in the eastbound lane. The traffic signal was green, but the truck remained stopped and continued to do so for about five seconds. Then, the pick-up truck began to move and, after five more seconds, made a U-turn to go westbound. The officer testified that "[t]he statute requires that if you're gonna make a left-hand turn, that you need to be in an appropriate turn lane, whether it be marked or whether it be the furthest, I guess, left-hand lane to turn from." The officer also testified that "it's illegal to do a U-turn at that controlled intersection, marked or unmarked."

¶3 The officer further testified that, based on the illegal U-turn, she was prepared to stop the vehicle. But she decided to do a U-turn herself so as to watch

and follow the vehicle to gather any other indicators of suspicious driving behavior. She suspected that the driver might be intoxicated. She observed that, after the U-turn had been made and the pick-up truck was going westbound, it was in the left lane. The vehicle then signaled over to the right lane, swerved outside the fog line for about three seconds and then returned to the right-hand, westbound lane of travel. As the officer was catching up to the pick-up truck, she noticed that the truck was not going the posted fifty-five miles per hour. The officer then activated her lights, the vehicle continued for about a block or two and the stop was made.

¶4 On cross-examination, Oetzman established, by means of an "overhead depiction" of the intersection, that there is a cross-over where a driver could make a U-turn. But the officer pointed out that the cross-over is only for authorized vehicles, maintenance vehicles or police vehicles. Of particular note, that "overhead depiction" is not part of the trial record or the appellate record.

¶5 After the officer's testimony was completed, Oetzman's attorney argued that "there was a reasonable question here about where exactly the officer saw the turnaround." Oetzman's attorney further argued that, while it is true that the statute prohibits U-turns at marked intersections, the law does not prohibit U-turns in mid-block or at a cross-over unless there is signage saying otherwise. The court interrupted and reminded counsel that the officer testified that the cross-over was for authorized vehicles only. The court also observed, "I don't know if there's any signage there, but that was her testimony." Counsel agreed. After hearing from the State, the court held that the U-turn was illegal because it was made from the "straight lane" rather than from the left-hand lane. The court alternatively decided that, even if the turn was legal, the stop was still good because the officer "perceived" an illegal U-turn without signaling and saw the

vehicle travel over the fog line for three seconds, drive "very slowly" afterward and stay stopped at a green light for a few seconds. The court reasoned that the totality of those facts justified the stop based on reasonable suspicion. Subsequently, a jury found Oetzman guilty of operating while intoxicated.

¶6 On appeal, he again raises the legality of the stop. He contends that the "trial court did not explicitly find that [the officer] observed an illegal U-turn, presumably because through cross-examination of the officer it was argued that there may have been some confusion about which intersection she actually observed the vehicle turn around from 200-300 yards away."

¶7 We disagree with Oetzman's interpretation. The court never suggested that the officer's account was suspect because she was 200 to 300 yards away. The court made a finding that the officer watched the vehicle make the U-turn from "a wrong lane." The "wrong lane" could only have been at the intersection where there was a left-turn lane, a right-turn lane and a straight lane. The testimony was that the vehicle was in the "straight lane." There was no testimony that there was more than one lane at the supposed cross-over, from which a driver could start a U-turn from the "wrong lane." And, as we alluded to above, while there was an exhibit consisting of an overhead photograph of the intersection, from which one might be able to tell whether a person could make a U-turn at the cross-over from the "wrong lane," that exhibit is not part of the appellate record. In fact, it appears from the exhibit list which is part of the appellate record that the overhead view, while marked and offered, was never received in evidence by the court. It is the appellant's duty to make sure that the appellate record contains all matters which this court needs in order to properly review an issue on appeal. ***State Bank v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Absent such evidence, this court may assume that

the missing record supports the trial court's decision. ***Id.*** As far as this court is concerned, the only evidence is that the turn took place at the intersection because that is the only place where there was a "straight lane" that was differentiated by a left-turn lane and right-turn lane. The trial court found that the turn was made from the "straight lane" and therefore impliedly accepted the officer's account as credible. This finding is not clearly erroneous.

¶8 As such, three rules of the road come into play. Under WIS. STAT. § 346.34(1), no person may turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in WIS. STAT. § 346.31. Section 346.31(1) says that where there are markers, the operator of the vehicle must follow those markers. A turn to the left, made from the "straight lane" rather than the marked left lane, violated this law. WISCONSIN STAT. § 346.33(1)(a) says that an operator of a vehicle shall not turn a vehicle at an intersection controlled by traffic signals so as to head in an opposite direction. Since the trial court believed the officer's testimony that the turn was made from the "wrong lane" and since this "wrong lane" turn could only have been made at the intersection, from the record we have, the turn was made at the intersection where there were traffic signals. The U-turn violated this law as well.

¶9 Once Oetzman was observed violating these two rules of the road, the officer was justified in stopping him because he violated the law. Therefore, this court does not even have to get to the question of whether the officer had enough facts which, while independently innocent, built the case for reasonable suspicion when considered in their totality.

¶10 But we will briefly get into that anyway. Oetzman was stopped for five full seconds at a green light. This may not be illegal in itself, but it is enough

to get the attention of a police officer who is trained to ferret out intoxicated drivers. Oetzman made what the officer was convinced was an illegal U-turn at an intersection. Oetzman then went from the left lane to the right lane, travelled over the fog lane for three seconds and then drove what the trial court found was a speed "significantly under" the speed limit. These facts, even if lawful in themselves, were building blocks of information, the totality of which was enough for the officer to suspect that the driver was intoxicated.

¶11 Oetzman has one other issue. He claims that, for the presumption of a BAC test's admissibility to take hold, the State must either have someone read the informing the accused form into evidence or introduce the form into evidence. His theory is that the informing the accused forms change all the time and it is necessary for the finder of fact to see whether the form complied with the law before the BAC results can be admitted. Oetzman has not cited to any case which requires this and we have found none. But he does cite to ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), to argue his theory inferentially. In that case, the officer never read the implied consent form to the defendant before obtaining a chemical blood test. ***Id.*** at 43. The supreme court held that the implied consent law is not the sole means for gathering this type of evidence. ***Id.*** at 51-52. Rather, if there is probable cause, then the exigent circumstances occasioned by the rapid depletion of alcohol in the blood provide an alternative basis to admit the chemical test result. *See* ***id.*** at 45, 52.

¶12 Oetzman cites to a particular portion of the supreme court's discussion where the court, in discussing the statutory scheme underlying Wisconsin's implied consent law, wrote:

> This statutory scheme provides incentive for the police to comply with the procedures of the implied consent law.

> If the procedures set forth in [WIS. STAT. § 343.305] are not followed the State not only forfeits its opportunity to revoke a driver's license for refusing to submit to a chemical test, *it also loses its right to rely on the automatic admissibility provisions of the law, sec. 343.305(7).*

Zielke, 137 Wis. 2d at 49 (emphasis added).

¶13 But reliance on ***Zielke*** begs the question, which is: If the officer testifies that she read the informing the accused form to the defendant and the defendant consented to the test, has the State made a prima facie case that the police officer complied with the implied consent law? ***Zielke*** does not answer that question. We do. If a law enforcement officer testifies that he or she read the defendant the informing the accused form, that testimony tells the finder of fact that the officer did her statutory duty. A prima facie case that the procedures have been followed is then made. If the defendant believes that the form read to the defendant was the wrong one or was incomplete in some way, that is the defendant's burden to prove because the burden of production has shifted to the defendant. Therefore, it is the defendant's responsibility to present evidence supporting the defense theory.

¶14 We reach this conclusion based on ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981). There, the defendant sought to suppress the results of a breathalyzer test on grounds that the testing methods and procedures did not meet certain provisions of the administrative code. ***Id.*** at 672. We explained that the proponent of a breath test result need not prove compliance with the administrative code. ***Id.*** at 672 n.2. We held that the breathalyzer tests carry a "prima facie presumption of accuracy" and the question of how accurately the test was performed goes to the weight to be given to the test, not its admissibility. ***Id.*** at 674.

¶15 Although the question in that case involved compliance with the administrative code rather than with the statutory requirements of the implied consent law, we also stated that WIS. STAT. § 343.305(7) (1981-82) sets no conditions for admissibility of the results of a breathalyzer test. ***Zielke***, 137 Wis. 2d at 673. In the same manner that we explained in ***Wertz*** regarding how questions as to the accuracy of the test performed go to the weight of the evidence rather than to the admissibility of the test, we reach the same answer with regard to the accuracy of the informing the accused form. In sum, the police officer testified that she read the informing the accused form to Oetzman. Thus, this evidence of the law enforcement officer having complied with the implied consent procedure was prima facie credible unless or until overcome by countervailing evidence in the eyes of the fact finder. We reject Oetzman's argument.

By the Court.—Judgment affirmed.

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