

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 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. 2009AP2561-CR

Cir. Ct. No. 2009CT35

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROME HOEHNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ Jerome Hoehne appeals a judgment of conviction for operating while intoxicated, third offense, on a plea of no contest

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.

following the circuit court's order denying his motion to suppress evidence. The circuit court denied Hoehne's suppression motion on grounds that probable cause existed to stop Hoehne for driving in the center lane of a three-lane roadway, contrary to WIS. STAT. § 346.13(2).

¶2 Hoehne argues the trial court erred in denying his suppression motion because the undisputed facts do not support probable cause to believe that he was in violation of WIS. STAT. § 346.13(2). In response, the State concedes that Hoehne did not violate § 346.13(2), and we agree. The State argues that the stop was nonetheless justified, however, because there was reasonable suspicion to believe that Hoehne was operating his vehicle while intoxicated. We disagree, and conclude that the totality of the circumstances did not provide a legal basis for the stop. We therefore reverse.

¶3 The facts, which are taken from the criminal complaint, the officer's report and suppression hearing testimony, are undisputed. Deputy Andrew Smith of the Grant County Sheriff's Department observed a vehicle driven by Jerome Hoehne traveling in the southbound center lane of Highway 61 up Stenner Hill shortly after 1 a.m. This stretch of Highway 61 has three lanes, two southbound and one northbound, separated by two unbroken yellow dividing lines. The deputy noted that Hoehne drove at between 48 and 55 mph while ascending the hill. The deputy observed Hoehne's vehicle move once from one side of his lane to the other. This movement was entirely within Hoehne's lane; the tires of Hoehne's vehicle did not make contact with either the unbroken yellow lines on one side of the lane or the broken white line on the other.

¶4 The deputy made a traffic stop of Hoehne's vehicle, and Hoehne was later arrested for operating a motor vehicle while intoxicated.² The deputy testified that he stopped Hoehne's vehicle because he believed he had observed a violation of WIS. STAT. § 346.13(2).

¶5 Hoehne was charged with operating a motor vehicle while intoxicated, third offense, and operating a motor vehicle with a prohibited alcohol concentration, third offense. Hoehne moved to suppress evidence on grounds that the traffic stop was not supported by reasonable suspicion or probable cause to believe that Hoehne had broken a criminal or traffic law. Following a hearing, the court determined that the facts as observed by the deputy did not constitute reasonable suspicion to believe that Hoehne was driving while intoxicated. Nonetheless, the court denied the motion, concluding that the officer had a legal basis to stop the vehicle because probable cause existed to believe that Hoehne had committed a violation of WIS. STAT. § 346.13(2) by driving in the center lane of the three-lane roadway. Hoehne was found guilty of operating a motor vehicle while intoxicated, third offense, on a no-contest plea. Hoehne appeals.

¶6 A traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. Both the United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. To be a reasonable seizure, a traffic stop must be based on either probable

² An analysis of a blood specimen provided by Hoehne approximately one hour after the stop indicated that Hoehne's blood alcohol content was .242.

cause or reasonable suspicion to believe that a criminal or traffic violation has been or will be committed. *See Post*, 301 Wis. 2d 1, ¶10.

¶7 Whether an officer has reasonable suspicion or probable cause to make a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We review the trial court’s findings of historical fact under the deferential clearly erroneous standard, but review de novo the application of those facts to constitutional principles. *Id.*

¶8 On appeal, the parties agree that the circuit court erred as a matter of law in determining that the undisputed facts showed Hoehne had committed a violation of WIS. STAT. § 346.13(2). We agree with the parties that the facts do not indicate a violation of this statute. Section 346.13(2) prohibits driving in the center lane of the three lane highway except: (a) “when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance”; (b) “in preparation for a left turn”; or (c) “where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is marked or posted to give notice of the allocation.” It is undisputed that the lane in which Hoehne was driving, the center lane of Highway 61, was “allocated exclusively to traffic moving in the direction” in which Hoehne was proceeding. Accordingly, his conduct was not contrary to § 346.13(2).

¶9 We turn to the State’s argument that the deputy observed facts that gave rise to a reasonable suspicion that Hoehne was driving while intoxicated. Hoehne notes that the deputy testified that his reason for the stop was his (mistaken) belief that Hoehne was in violation of WIS. STAT. § 346.13(2), not that he suspected Hoehne was driving while intoxicated. However, the test for whether

a legal basis exists for a stop is an objective one; whether an investigative stop is reasonable is based on the objective facts, not the officer's subjective beliefs. *See State v. Kramer*, 2008 WI App 62, ¶¶35-37, 311 Wis. 2d 468, 750 N.W.2d 941, *aff'd.*, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598. We therefore review the facts observed by the deputy to determine whether they constitute reasonable suspicion to believe that Hoehne was driving while intoxicated.

¶10 These facts include: (1) variation in speed of between 48 and 55 miles per hour; (2) a single sideways movement within the vehicle's lane; (3) the late hour. The State argues that, taken together, these facts support reasonable suspicion that Hoehne was driving while intoxicated, and it analogizes these facts to those constituting reasonable suspicion in *Post* and *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996). As we explain below, the facts of the present case provide significantly less justification for a traffic stop than those of *Post* and *Waldner*.

¶11 In *Post*, a vehicle was observed at 9:30 p.m. weaving several times in a wide S-type pattern for two blocks in a double-wide lane that included a parking lane and a traffic lane. *Post*, 301 Wis. 2d 1, ¶36. By contrast, here the officer observed a single movement from one side of his lane to the other within a standard-sized lane, a movement that was not even one "weave" (much less several) because the vehicle did not shuttle back to the other side of the lane to complete a "weaving" motion. *See* WEBSTER'S II NEW COLLEGE DICTIONARY 1251 (1993) (defining "weave" as used in this context as "[t]o move or progress by winding in and out or shuttling from side to side").

¶12 In *Waldner*, a vehicle was observed at around 12:30 a.m. traveling at a slow rate of speed when it stopped at an uncontrolled intersection. *Waldner*, 206

Wis. 2d 51, 53-54. The driver then opened his door and dumped liquid and ice from a plastic cup onto the road, and turned and accelerated at a high rate of speed away from the intersection. *Id.* at 53. Aside from the late hour, there is little in *Waldner* that is similar to the present case. The *Waldner* court characterized Waldner's driving as "unusual." *Id.* By contrast, Hoehne's driving, which included a single movement from one side of his lane to the other and a variation in speed of 48 to 55 miles per hour, was not out of the ordinary. The seven-mile-per-hour variation in Hoehne's speed was not marked, and was explained in part by the fact that Hoehne's vehicle was ascending a hill. The combination of this relatively small degree of variation in speed under these circumstances and the single movement within a standard-sized lane does not constitute "unusual" driving.

¶13 Thus, based on the observed facts, we conclude that the totality of the circumstances did not give rise to a reasonable suspicion that Hoehne was driving while intoxicated. The State does not provide any additional justification for the stop, and we are aware of none. Accordingly, we conclude that the stop was not reasonable, and thus the court erred in denying Hoehne's suppression motion. We therefore reverse.

By the Court.—Judgment reversed.

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

