

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 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. 2010AP297

Cir. Ct. No. 2009TR14561

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

COUNTY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

KATHERINE R. HARMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

¶1 FINE, J. Katherine R. Harmon appeals the circuit court's judgment finding her guilty on stipulated facts of driving while under the influence of an intoxicant as a first offense. See WIS. STAT. § 346.63(1)(a). She contends that the circuit court erred in not suppressing evidence of her impairment, arguing that the

deputy who stopped her did not have the requisite reasonable suspicion. We affirm.

I.

¶2 The only person to testify at the suppression hearing was the deputy sheriff who stopped her. He testified that at about 2 a.m. in late May of 2009, he was part of the Milwaukee County sheriff's "OWI task force" assigned "[t]o look for impaired drivers on the roadways in Milwaukee County." During sixteen of his twenty years as a deputy, he used clues he had been taught to detect impaired drivers. He told the circuit court that he saw Harmon driving west on highway I-94 when he stopped her for "erratic driving." He saw:

- "her drive on lane-divider lines";
- drive across the lane-divider "by about a half a foot"; and
- "jerkiness in her front steer tires while she was driving."

¶3 Harmon's driving and the deputy's stop of her car was recorded by a camera in the deputy's squad car, and the video was played in court. It is also part of the Record, and we have watched it as well. After seeing the video played in court, the deputy noted on cross-examination that he saw on the video "a lane deviation" he had not seen that early morning because "the delay on the camera picks up before I notice[d] it," explaining that "as soon as I activate the record button it [the recorder] goes back like 15 or 20 seconds prior."

¶4 The deputy explained that "jerkiness" was the "[p]hysical manipulation of the steering wheel on a vehicle." The "jerkiness," however, was not visible on the video because, as the circuit court observed, the video's

resolution was poor. Indeed, even large and well-lit highway signs are, for the most part, impossible or difficult to read. The deputy then amplified on what he meant by “jerkiness”:

As a vehicle’s steer tires are driving down the road, everybody can see that they are going straight. With a physical manipulation on a steering wheel, there’s a slight jerkiness. And on most cars unless the front end is bad, you are going to see that tire swerve like slightly. I mean, it’s something that you pick up during training. It’s something that we’re taught. Most people won’t recognize that, but that is something we are taught and we recognize.

¶5 The deputy testified on cross-examination that although jerkiness is not a traffic offense, “it’s something that can be noted for impairment, for a person to be impaired” because when drivers are impaired, “they tend to try and -- they are driving harder or looking harder to stay in their lane and their manipulation of the steering wheel [is] to try and stay in the middle of the lane or whatever if they think they are going over to the right or to the left that the steering wheel just moves.” He admitted that he did not see Harmon jerk the steering wheel, and that the jerkiness he saw could be a “bad suspension.”

II.

¶6 A law-enforcement officer may lawfully stop a driver to investigate further if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop” even though he or she lacks probable cause for an arrest. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 8, 733 N.W.2d 634, 637 (quoted source omitted); *see also State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 132, 765 N.W.2d 569, 576 (“Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she

has grounds to reasonably suspect that a crime or traffic violation has been or will be committed.”). We evaluate *de novo* whether a traffic stop violates a driver’s constitutional rights. *Post*, 2007 WI 60, ¶8, 301 Wis. 2d at 6–7, 733 N.W.2d at 636–637. We accept the trial court’s findings of fact unless they are clearly erroneous. *Id.*, 2007 WI 60, ¶8, 301 Wis. 2d at 6–7, 733 N.W.2d at 637.

¶7 Common sense determines whether an officer has the requisite reasonable suspicion to make a stop, and is “based on the totality of the facts and circumstances.” *Id.*, 2007 WI 60, ¶13, 301 Wis. 2d at 9, 733 N.W.2d at 638. Although merely weaving within the confines of a driver’s traffic lane is not sufficient to support reasonable suspicion sufficient to make a traffic stop, *id.*, 2007 WI 60, ¶14, 301 Wis. 2d at 9, 733 N.W.2d at 638, it may be part of the mosaic that constitutes the requisite reasonable suspicion, *id.*, 2007 WI 60, ¶¶19–26, 301 Wis. 2d at 11–16, 733 N.W.2d at 639–641. That is what we have here. Further, it is a forfeiture offense to violate WIS. STAT. § 346.13(1), which provides: “The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.” *See* WIS. STAT. § 346.17(1) (penalties for violating § 346.13(1)). Thus, the deputy could have stopped Harmon for that violation alone. *See Popke*, 2009 WI 37, ¶¶12–14, 317 Wis. 2d 118, 126–128, 765 N.W.2d 569, 574 (crossing “the center of the road only momentarily” is a violation of the traffic code and, therefore, the officer’s stop of the driver was lawful) (probable cause to believe that the driver violated the traffic code).

¶8 Although Harmon contends that the video disputes the deputy’s testimony, the circuit court determined that it did not. As noted, we have also

reviewed the video; we agree with the circuit court that the video is consistent with the deputy's testimony. Accordingly, the circuit court's findings of fact are not clearly erroneous. On our *de novo* review of the legal issue, we also agree with its determination that the deputy lawfully stopped Harmon.

By the Court.—Judgment affirmed.

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

