

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 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. 2010AP693-CR

Cir. Ct. No. 2007CF171

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN L. SHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
JAY R. TLUSTY, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Kevin L. Shaw appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, fifth

offense. *See* WIS. STAT. § 346.63(1)(a) (2007-08).¹ Shaw contends that both the stop of his vehicle and his arrest were unconstitutional, requiring suppression of the evidence police obtained following the stop and arrest. We conclude that the investigative traffic stop was supported by probable cause that Shaw had committed a traffic violation, and that the arrest was supported by probable cause that Shaw had committed the offense of driving while intoxicated. Accordingly, we conclude that the stop and arrest were constitutional, and affirm.

BACKGROUND

¶2 On April 26, 2007, at around 6:00 p.m., Deputy Tyler Iverson observed Shaw's vehicle move abruptly from the right lane completely onto the shoulder of the road, and then move back into the right lane, while maintaining a speed of about forty miles per hour. Iverson then followed Shaw and activated his emergency lights. When Shaw did not stop, Iverson activated his siren, first intermittently and then continuously. After about thirty seconds of Iverson's attempting to stop Shaw's vehicle, Shaw stopped at his destination.²

¶3 Iverson then made contact with Shaw, and noted the odor of intoxicants on Shaw's person. Iverson also noted that Shaw's eyes were bloodshot, his speech was slow and deliberate, and his voice was raspy, as compared to the average person. Iverson asked Shaw if he had been drinking, and Shaw indicated that he had one or two beers earlier in the day. When Iverson

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

² Shaw testified that he did not see the emergency lights due to items in the back of his vehicle, and did not hear the siren due to loud music inside his vehicle.

requested field sobriety tests, Shaw stated that he had a disability in his hips and legs and also indicated he was on pain medication.

¶4 Iverson conducted several field sobriety tests on Shaw and noted numerous “clues” of impairment. Iverson also had Shaw perform a preliminary breath test, which indicated a blood alcohol content of .015. Iverson then placed Shaw under arrest for driving while under the influence of an intoxicant.

¶5 The State charged Shaw with operating while under the influence, fifth offense, among other charges arising out of this incident. Shaw moved to suppress the evidence obtained as a result of his stop and arrest. After a hearing, the circuit court determined that the stop and arrest were constitutional and denied Shaw’s motion. Shaw then pled no-contest to operating while under the influence, fifth offense, and the court entered a judgment of conviction. Shaw appeals.

STANDARD OF REVIEW

¶6 Whether a stop or an arrest is constitutional is a question of constitutional fact. *See State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569; *State v. Secrist*, 224 Wis. 2d 201, 207-08, 589 N.W.2d 387 (1999). “A finding of constitutional fact consists of the circuit 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.” *Popke*, 317 Wis. 2d 118, ¶10 (citation omitted).

DISCUSSION

¶7 An investigative traffic stop is constitutional if it is supported by probable cause to believe a traffic violation has occurred or reasonable suspicion that a violation has been or will be committed. *See id.*, ¶11. We conclude that the

stop of Shaw's vehicle was supported by probable cause to believe Shaw had violated WIS. STAT. § 346.13(1), and therefore was a constitutional stop.³

¶8 WISCONSIN STAT. § 346.13(1) provides that “[t]he 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.” Iverson testified, and the circuit court found, that Iverson observed Shaw drive completely outside of his lane, onto the shoulder, and then resume his position within his lane, while maintaining his rate of speed. Shaw does not dispute the circuit court's factual finding, but argues that a single weave onto the shoulder does not violate § 346.13(1). Shaw contends that there is no case law establishing that a single crossing onto the shoulder violates § 346.13(1). He also points out that there was no indication that his conduct posed any danger to other vehicles.

¶9 The State contends that Shaw's driving completely outside of his lane of travel violated WIS. STAT. § 346.13(1), thus providing probable cause for a stop. In support, the State cites *Popke*, 317 Wis. 2d 118. There, the supreme court held that an officer had probable cause to stop a vehicle after observing the vehicle swerve to the left of the center line, contrary to WIS. STAT. § 346.05. *Popke*, 317 Wis. 2d 118, ¶17. The court rejected the defendant's argument that he was not “driving” left of center because he only “momentarily” deviated into the left lane.

³ Because we conclude that the stop of Shaw's vehicle was supported by probable cause to believe Shaw had violated WIS. STAT. § 346.13(1), we need not reach the parties' arguments over whether the stop was supported by reasonable suspicion that Shaw was driving while under the influence. Similarly, we need not reach the State's argument that there was probable cause to stop Popke based on other statutory violations.

Id., ¶18. The court relied on the definition of “driving” in § 346.63(3)(a)—“the exercise of physical control over the speed and direction of a motor vehicle while it is in motion”—to conclude that the defendant’s actions had violated the statute, even if only briefly and in a manner that may occur commonly, thus establishing probable cause for the stop. *Id.*, ¶¶17-19 (citation omitted).

¶10 We conclude that under the plain language of WIS. STAT. § 346.13(1), Shaw’s deviation from his lane onto the shoulder of the road was sufficient to establish probable cause to believe Shaw committed a traffic violation. When Iverson observed Shaw’s conduct, he had probable cause to believe Shaw did not “drive as nearly as practicable entirely within a single lane.” *See* § 346.13(1). Indeed, Shaw drove *entirely* outside of the lane. Iverson’s personal observation provided him with probable cause—that is, “the ‘quantum of evidence which would lead a reasonable police officer to believe’ that a traffic violation had occurred.” *See Popke*, 317 Wis. 2d 118, ¶14 (quoting *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). Thus, the stop was constitutionally reasonable.

¶11 We turn, then, to whether Shaw’s arrest was constitutional. Under both the United States and Wisconsin constitutions, a warrantless arrest must be supported by probable cause. *State v. Lange*, 2009 WI 49, ¶19 & n.6, 317 Wis. 2d 383, 766 N.W.2d 551. The State is required to establish there was probable cause to support an arrest for operating under the influence by showing there was “that quantum of evidence within the arresting officer’s knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.*, ¶19. Here, the State presented testimony by Iverson that Iverson observed Shaw swerve onto the shoulder of the road and then back into his own

lane while maintaining his rate of speed; that Shaw failed to respond to Iverson's emergency lights and siren;⁴ that Iverson observed that Shaw's eyes were bloodshot, he spoke in a slow and deliberate manner, and his voice was raspy; that Shaw admitted to having one or two beers earlier in the day and stated he was on pain medication; that Shaw performed field sobriety tests indicating numerous "clues" of intoxication; and that Shaw's preliminary breath test indicated a blood alcohol content of .015. We conclude that these facts, under the totality of the circumstances, established probable cause to believe that Shaw had operated a motor vehicle while under the influence of an intoxicant.

¶12 Shaw disputes that the facts of this case established probable cause for the arrest. He points out that his preliminary breath test result was well within the legal limit. He also contends that the field sobriety tests did not establish that he was impaired, particularly because he informed Iverson that he has disabilities in his hips and legs. He also contends that Iverson did not have any specific information as to Shaw's pain medication that would support an inference that Shaw was impaired.

¶13 The problem with Shaw's argument is that it presents a piecemeal analysis of certain facts rather than an analysis of the totality of the circumstances. *See id.*, ¶23. It is true that Shaw's preliminary breath test result was within the legal limit, and that Shaw only disclosed generally that he was on pain medication for his disabilities, facts that in isolation may not amount to probable cause. We

⁴ Again, we note that Shaw testified as to why he did not stop in response to the emergency lights and siren. We merely include this fact as one factor in the totality of the circumstances, and we acknowledge that Iverson knew of a possible innocent basis for Shaw's failure to stop.

also agree that the field sobriety tests were not in themselves conclusive, particularly given Shaw's alleged hip and leg disability, although we note that the circuit court made a finding of fact, after viewing Shaw on the police video of the traffic stop, that Shaw displayed typical movements of a larger man that did not suggest a disability that would interfere with the sobriety tests. Regardless, however, the facts as a whole—Shaw's abrupt and extreme swerve onto the shoulder of the road and then back into his lane; Shaw's failure to respond to the emergency lights and siren; an indication that Shaw consumed alcohol while on pain medication; Shaw's bloodshot eyes, slow and deliberate speech, and raspy voice; and some difficulty in performing field sobriety tests—provided the requisite probable cause to support the arrest. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

