

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2011

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. 2010AP834

STATE OF WISCONSIN

Cir. Ct. Nos. 2008TR7380
2008TR7381

**IN COURT OF APPEALS
DISTRICT II**

KENOSHA COUNTY,

PLAINTIFF-RESPONDENT,

V.

JODI A. BRAUNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

¶1 REILLY, J.¹ Jodi A. Braune appeals from a judgment of conviction for operating a motor vehicle while intoxicated. Braune contends that as the deputy who stopped her vehicle did not have probable cause or reasonable suspicion to conduct a traffic stop, the evidence used to convict her should have been suppressed. We conclude that the deputy's investigative traffic stop was supported by probable cause that Braune committed a traffic violation. Braune's conviction is affirmed.

FACTS

¶2 A little after 2:00 a.m. on September 10, 2008, Kenosha County Sheriff's Deputy David Gomez was on routine patrol when he began to follow Braune's vehicle. After the deputy observed Braune's vehicle cross the fog line on the right side of the road and then return to its lane, the deputy pulled over Braune. Braune was later cited for operating a motor vehicle while intoxicated (contrary to an ordinance adopting WIS. STAT. § 346.63(1)(a)) and for failing to drive in her designated lane (contrary to an ordinance adopting WIS. STAT. § 346.13(3)). A bench trial was held and Braune was found guilty of both citations.²

¶3 On appeal Braune argues that as crossing a fog line is not a violation of WIS. STAT. § 346.13(3), the deputy did not have probable cause or reasonable suspicion to conduct a traffic stop. We disagree and affirm her conviction.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Braune does not appeal her conviction for failing to drive in her designated lane. *See City of Kenosha v. Braune*, No. 2010AP835, unpublished slip op. (Wis. Ct. App. Apr. 8, 2010).

STANDARD OF REVIEW

¶4 A police officer may conduct a traffic stop when he has probable cause to believe that a traffic violation occurred. *State v. Popke*, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569. Even when an officer does not have probable cause that a traffic violation occurred, he may still conduct a traffic stop when he has reasonable suspicion under the totality of the circumstances that a crime or traffic violation was committed or will be committed. *Id.*, ¶23. Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *Id.*, ¶10. “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.” *Id.*

DISCUSSION

¶5 WISCONSIN STAT. § 346.13(3) provides that “when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.” The deputy testified and the circuit court found that Braune drove completely across the fog line with the right front and rear tires, before returning to her lane of traffic. Braune does not dispute the circuit court’s factual finding, but argues that crossing a fog line does not by itself violate § 346.13(3). Braune contends that there is no case law establishing that a single crossing of the fog line violates § 346.13(3). She also argues that there was no evidence that her conduct posed any danger to other vehicles. The State contends that as Braune violated § 346.13(3) when she crossed the fog line, the deputy had probable cause to conduct a traffic stop.

¶6 In *Popke*, 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” on the wrong side of the road because he only “momentarily” crossed the center line. *Id.*, ¶18. The court relied on the definition of “driving” found in WIS. STAT. § 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 violated the statute, even if only briefly and in a manner that may occur commonly. *Id.*, ¶¶18-19. Probable cause was thus established for the traffic stop. *Id.*, ¶17.

¶7 We hold that under the plain language of WIS. STAT. § 346.13(3), Braune’s deviation over the fog line was sufficient to establish probable cause that Braune committed a traffic violation. When the deputy observed Braune’s conduct, he had probable cause that Braune did not drive “in the lane designated.” *See* § 346.13(3). Indeed, Braune drove completely across the outside of the lane with the right side of her vehicle. The deputy’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 has occurred.” *Popke*, 317 Wis. 2d 118, ¶14 (citation omitted). Thus, the deputy’s stop of Braune was constitutionally permissible.³

³ As we conclude that the deputy had probable cause to believe that Braune violated WIS. STAT. § 346.13(3), we need not discuss whether the deputy had reasonable suspicion under the totality of the circumstances that Braune committed a traffic violation.

CONCLUSION

¶8 As we hold that the deputy had probable cause to conduct the traffic stop of Braune, we affirm Braune's conviction.

By the Court.—Judgment affirmed.

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

