

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 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. 2011AP1875-CR

Cir. Ct. No. 2010CT183

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL B. KIND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Nathaniel B. Kind appeals a judgment of conviction for operating while intoxicated (OWI), third offense, in violation of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a). He contends the police officer did not have reasonable suspicion to stop his vehicle and therefore the circuit court erred in denying his motion to suppress evidence from the traffic stop. Because we conclude the officer had reasonable suspicion for the traffic stop, we affirm.

BACKGROUND

¶2 The relevant facts are undisputed. Deputy Sheriff Brian Grafton testified at the hearing on the motion to suppress evidence. He testified that at 10:28 p.m. on a Saturday in January, he was on routine traffic patrol on a county road when he observed Kind's vehicle cross over the white fog line for approximately one to two seconds. The movement over the fog line and back into the lane was "gradual." Deputy Sheriff Grafton testified that this observation prompted him to drive up closer to Kind's vehicle and to observe the vehicle's continued path of travel.

¶3 Deputy Sheriff Grafton testified that he then observed Kind's vehicle gradually cross over the fog line again. The two tires on the right side of Kind's vehicle remained over the fog line for three to four seconds before Deputy Sheriff Grafton turned on his emergency lights and initiated the traffic stop. Deputy Sheriff Grafton testified that the fact Kind's vehicle crossed the fog line a second time led him to believe that the driver was being inattentive, possibly "falling asleep at the wheel," or "the driver was possibly intoxicated." He also testified that the road was level, straight, and clear of debris, and that he did not see any reason for the vehicle to have crossed out of the lane.

¶4 The circuit court was shown a video taken from the dashboard of Deputy Sheriff Grafton's squad car. The circuit court found that the video showed

Kind's vehicle "touch or cross the fog line initially," and then showed that the vehicle "goes over [the fog line] and continues to drive straddling the fog line."

¶5 On cross-examination, Deputy Sheriff Grafton acknowledged that he did not observe Kind's vehicle weave within its lane of traffic or drive at a speed above the speed limit.

¶6 The circuit court held that Deputy Sheriff Grafton's testimony that the highway was straight and level, in combination with the court's findings of fact drawn from the dashboard video, were sufficient to establish reasonable suspicion for the stop. Accordingly, the circuit court denied the motion to suppress. Kind pleaded no contest and was convicted of operating while intoxicated, third offense, in violation of WIS. STAT. § 346.63(1)(a).

DISCUSSION

¶7 Kind contends that Deputy Sheriff Grafton did not have reasonable suspicion for the stop. According to Kind, Deputy Sheriff Grafton pulled him over only because the officer erroneously believed that crossing the fog line constitutes a traffic violation. This mistake of law, contends Kind, cannot form the basis for a lawful stop. Kind also contends that the totality of the circumstances is insufficient to create a reasonable suspicion for the stop. In support of this argument, Kind asserts that the present case is governed by *State v. Post*, 2007 WI 60, ¶2, 301 Wis. 2d 1, 733 N.W.2d 634, where the supreme court held that repeated weaving by a driver within a single lane does not alone give rise to the reasonable suspicion necessary for a traffic stop. For the reasons that follow, we reject Kind's contentions.

¶8 A traffic stop is a seizure within the Fourth Amendment; however, it is permissible if the officer has grounds to reasonably suspect a traffic violation has been or will be committed. *See State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). The test of reasonable suspicion is an objective one, taking into consideration the totality of the circumstances. *State v. Waldner*, 206 Wis. 2d 51, 56-57, 556 N.W.2d 681 (1996). The suspicion must be “grounded in specific, articulable facts and reasonable inferences from those facts” *Id.* We uphold the circuit court’s findings of fact unless they are clearly erroneous. *State v. Martwick*, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552 (citation omitted). Whether the facts meet the constitutional requirement of reasonableness under the Fourth Amendment is a question of law, which we review de novo. *See id.* (citation omitted).

¶9 We conclude the observations that Deputy Sheriff Grafton described in his testimony are sufficient to permit a reasonable officer to reasonably suspect that Kind was driving under the influence of an intoxicant.

¶10 As an initial matter, we note that our analysis in this case does not change even if we assume without deciding that crossing over a fog line on a county highway in the manner that Kind did is not a traffic violation. The test for reasonable suspicion is an objective one. *See State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987). Our supreme court held in *Baudhuin*: “As long as there was a proper legal basis to justify the intrusion, the officer’s subjective motivation does not require suppression of the evidence or dismissal.” *Id.* As we explain below, the totality of the circumstances in this case gives rise to a reasonable suspicion that Kind was driving while intoxicated. Accordingly, Deputy Sheriff Grafton’s subjective reason for stopping Kind—even if based upon

a mistaken conclusion that crossing the fog line is a traffic violation—does not render the stop unlawful.

¶11 “[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” *Waldner*, 206 Wis. 2d at 60 (citation omitted). Here, the reasonable inferences that can be drawn from Kind’s driving over the fog line twice, taken in consideration with the totality of the circumstances, are sufficient to establish reasonable suspicion.

¶12 Kind crossed over the fog line twice. Deputy Sheriff Grafton testified that he could not see any explanation for the vehicle’s lateral movement across the fog line. The highway was straight, not curved, and there was no debris on the highway. Deputy Sheriff Grafton testified that, based upon Kind’s crossing the fog line a second time, he believed, based on his training and experience, that Kind was possibly “falling asleep at the wheel” or “possibly intoxicated.”

¶13 We have held that an officer’s training and experience is another factor to consider in the totality of the circumstances equation. *See State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999) (citation omitted). Deputy Sheriff Grafton testified that he had been a deputy sheriff for almost nine years and had been working in his current position on the road for two years by the time of Kind’s arrest. Before he began his position as a deputy, he completed three months of training at the recruit academy, which covered traffic violations, OWI violations, and traffic stop procedures. Six years later he went through a mini-academy where he received an update on issues related to patrol work, field

sobriety testing, and traffic stops. He also received two months of field training with a field training officer. This training and experience supports Deputy Sheriff Grafton's suspicion that driving over the fog line indicated that the driver was impaired.

¶14 The time of night and day of the week of the incident are also factors that contribute to reasonable suspicion that Kind was operating his vehicle under the influence of alcohol. *See State v. Lange*, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551. The incident here occurred at 10:28 p.m. on a Saturday night, which lends credence to Deputy Sheriff Grafton's suspicion that Kind was driving while intoxicated. *See Post*, 301 Wis. 2d 1, ¶36 (opining that the time of 9:30 at night, although "not as significant as when poor driving takes place at or around 'bar time,'" is a significant factor when determining whether an officer had reasonable suspicion to make a traffic stop); *Lange*, 317 Wis. 2d 383, ¶32 (noting that common knowledge tells us that people tend to drink on weekends).

¶15 While any one of these facts, standing alone, might be insufficient to constitute reasonable suspicion, "such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn." *Post*, 301 Wis. 2d 1, ¶37 (citation omitted). Here, Deputy Sheriff Grafton's observations of Kind crossing the fog line twice on a straight and level road without any other explanation for the lateral movement, along with the other factors we have discussed above—the fact that the incident took place at 10:28 p.m. on a Saturday and Deputy Sheriff Grafton's training and experience—give rise to a reasonable suspicion that Kind was driving while intoxicated. These factors add up to more than the "[r]epeated weaving within a single lane," that the *Post* court refused to deem, as a bright line rule, sufficient to justify a traffic stop. *See id.*, ¶20.

Accordingly, we reject Kind's contention that crossing the fog line twice in this case is just like weaving within a lane, as discussed in *Post*.

¶16 Accordingly, we conclude Deputy Sheriff Grafton had reasonable suspicion for the traffic stop.

CONCLUSION

¶17 The judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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

