

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 29, 2012

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. 2011AP2153

Cir. Ct. No. 2010TR4171

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

KENNETH E. MAUSER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Kenneth E. Mauser appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), entered after a

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

trial to the court on stipulated facts. Mauser contends that the circuit court erred in denying his motion to suppress evidence, in which he argued the arresting officer did not have reasonable suspicion to stop his vehicle. Considering the totality of the circumstances, including the arresting officer's testimony that Mauser did not dim his high-beam headlights appropriately and was weaving both within and outside of his traffic lane, we affirm the circuit court's conclusion that the officer had reasonable suspicion to stop Mauser.

¶2 Following his arrest on September 24, 2010, Mauser was charged with OWI, driving with a prohibited alcohol content (PAC) and improper use of multiple-beam headlights.² Mauser moved to suppress the evidence surrounding his stop, arguing that the stop was unreasonable and prohibited under the Fourth Amendment of the United States Constitution.

² WISCONSIN STAT. § 347.12(1), paragraphs (a) and (b), governs required dimming of high-beam headlights for approaching traffic.

(a) Whenever the operator of a vehicle equipped with multiple-beam headlamps approaches an oncoming vehicle within 500 feet, the operator shall dim, depress or tilt the vehicle's headlights so that the glaring rays are not directed into the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps at an oncoming vehicle whose high-beam headlamps are lit.

(b) Whenever the operator of a vehicle equipped with multiple-beam headlamps approaches or follows another vehicle within 500 feet to the rear, the operator shall dim, depress, or tilt the vehicle's headlights so that the glaring rays are not reflected into the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps as provided under par. (a).

¶3 At the suppression hearing, the arresting officer, Sheboygan County Deputy Sheriff Steven Wimmer, testified about his stop of Mauser's vehicle. At about 11:31 p.m. on September 24, 2010, Wimmer saw Mauser's oncoming vehicle headed eastbound on State Highway 23, a divided highway with a sixty-foot-wide grassy median. Wimmer turned around to follow Mauser after he saw that Mauser did not dim his high-beam headlights for oncoming traffic and for passing vehicles in his lane.

What drew my attention was this vehicle was at that time traveling eastbound on State Highway 23 in the left lane, the vehicle was coming towards my location, there were other vehicles in the right lane, and it had its brights on. And as the vehicle kept approaching my location, all of the vehicles traveling westbound and the vehicles either in front of or being passed eastbound with the other vehicle, he continued to leave his brights on.

¶4 While following Mauser, Wimmer observed Mauser's vehicle "weaving significantly" within and outside of its traffic lane. Wimmer saw that Mauser did not dim his high-beam headlights when there was another vehicle 300 to 400 feet in front of Mauser's vehicle traveling in the same direction. Wimmer stopped Mauser's vehicle by turning on his red and blue lights, which in turn automatically activated his squad car's video recorder. After further investigation, Wimmer arrested Mauser on suspicion of OWI and PAC and cited him for failure to dim high-beam headlights.³

¶5 Wimmer also testified at the suppression hearing as to his experience and training, indicating that he had been a deputy with the Sheboygan County Sheriff's Department for "[g]oing on six years." During that time he had always

³ The PAC charge was dismissed and the failure to dim headlights within 500 feet charge was dismissed and read in for sentencing.

worked third shift. Wimmer also had completed multiple courses related to impaired driving, including an “advanced roadside intoxication drug recognition course.” Wimmer testified that he had made “probably near 150 OWI arrests.”

¶6 The circuit court found “under the totality of the circumstances that Deputy Wimmer had reasonable suspicion that the defendant was driving impaired.” The circuit court referred to Mauser’s use of high-beam headlights under circumstances when “most considerate and careful drivers would not have their high beams on.” The circuit court noted Wimmer’s testimony that “based on his experience [failure to dim high beams] has some indicia of intoxication.” “More importantly,” the circuit court noted, “he testified that the car was weaving in and out of its lane of travel.” Finally, the circuit court indicated: “I find Deputy Wimmer’s testimony to be credible.” The circuit court denied the motion to suppress.

¶7 Mauser argues Wimmer lacked reasonable suspicion to detain him, thus violating his constitutional right to be free from unreasonable search and seizure. Mauser points out that the circuit court did not find that Mauser was in violation of the high-beam statute, WIS. STAT. § 347.12, at the time of the stop. Mauser further indicates that the circuit court acknowledged that the video recording of the stop did not show weaving that would justify the stop.

¶8 Whether a traffic stop is reasonable is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. A question of constitutional fact presents a mixed question of law and fact. *Id.* We review the circuit court’s findings of fact under the clearly erroneous standard, but we review independently the application of those facts to the constitutional principle. *Id.*

¶9 A police officer may conduct an investigative stop if he or she is “able to point to specific and articulable facts which, taken together with inferences from those facts, reasonably warrant the intrusion of the stop.” *Id.*, ¶10 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The intrusion is warranted if the officer reasonably believes the person is committing, is about to commit or has committed a crime. WIS. STAT. § 968.24; *Post*, 301 Wis. 2d 1, ¶13. The reasonableness of the stop is determined by the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶13.

¶10 The circuit court properly looked to the totality of the circumstances and found the stop reasonable. The circuit court did not rely exclusively on either the high-beam headlight use or the weaving; rather, the circuit court looked at all the circumstances surrounding the stop and found reasonable suspicion. The circuit court’s factual findings are not erroneous, and we confirm the circuit court’s application of these facts to the law. There was reasonable suspicion to stop Mauser.

¶11 Regarding high-beam usage, when Wimmer first noticed Mauser, Mauser was traveling in the opposite direction on the divided highway. Wimmer testified that Mauser did not dim his lights even though other vehicles were within 500 feet, traveling in the same direction as Mauser’s vehicle. The operation of high beams within 500 feet of another vehicle can establish reasonable suspicion to stop a vehicle. *See State v. Tomaszewski*, 2010 WI App 51, ¶¶10-11, 324 Wis. 2d 433, 782 N.W.2d 725. Wimmer’s testimony that Mauser did not dim his high-beam headlights is enough to give Wimmer reasonable suspicion to stop Mauser.

¶12 Regarding weaving, Wimmer testified that Mauser was weaving both within and outside of his lane:

As I was approaching the vehicle, I could see it weaving within—in and out of its traffic lane. As I started getting up on the vehicle, it started to brake heavy. Then as the vehicle was braking heavy, it was doing what we call—I call it the impaired weave.

Wimmer explained the “impaired weave:”

Well, I said I have got probably near 150 OWI arrests, and you see it fairly frequently. Someone who is impaired has difficulty maintaining a straight track of their vehicle.

Finally, Wimmer testified that the weaving outside of the lane occurred as he was catching up to Mauser’s vehicle, just before he turned on his siren, activating his video recorder. The trial court found Wimmer’s testimony credible that Mauser was weaving prior to that portion of the stop that was captured on video. Weaving can contribute to reasonable suspicion that a driver is impaired so as to justify an investigatory stop. *See Post*, 301 Wis. 2d 1, ¶¶37-38 (weaving, even within a lane, can be part of the totality of circumstances justifying a stop).

¶13 Here, the circuit court properly looked to the totality of the circumstances and found the stop reasonable. The failure to dim high-beam headlights appropriately, coupled with the weaving, justified the stop. The circuit court noted Wimmer’s experience and specifically found his testimony credible. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

