COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1788 **Cir. Ct. No. 2013CV1063**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

TOWN OF GRAND CHUTE,

PLAINTIFF-RESPONDENT,

V.

SHELLEY L. KOWALEWSKI,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Affirmed*.

¶1 HRUZ, J.[1] Shelley Kowalewski appeals an order adjudging her guilty of operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(PAC), both as a first offense.[2] She also appeals an order denying her motion to suppress evidence. Kowalewski contends the police lacked both reasonable suspicion and probable cause to initiate a traffic stop of her vehicle, such that the stop represented an unconstitutional seizure. Because we conclude that, at the time of the stop, the police had probable cause to believe that Kowalewski had committed a traffic violation, we affirm the circuit court.

BACKGROUND

¶2 The relevant facts are taken primarily from the May 15, 2014 hearing on Kowalewski's motion to suppress. Town of Grand Chute police officer Shawn Enneper testified that in the early hours of January 27, 2013, he was working patrol duties in his marked squad car. As he was traveling westbound on West College Avenue, he observed Kowalewski's vehicle ahead of him. Enneper testified the time was approximately 2:30 a.m., and there was normally "bar traffic" proceeding through the Town at that time.

¶3 While Enneper could not remember the distance he was behind Kowalewski's vehicle, he testified that her driving behavior initially drew his attention because the vehicle was drifting within its lane of traffic. Based on that observation, Enneper activated the mobile camera in his squad car. According to Enneper, he saw both the front and rear passenger tires on the vehicle touch the

[2] The record does not establish that Kowalewski was actually punished for both offenses. A defendant may be charged and found guilty of both offenses, although he or she may not be *punished* for both under the legislative scheme. *See generally* ***State v. Raddeman***, 2000 WI App 190, 238 Wis. 2d 628, 618 N.W.2d 258 (relying on ***State v. Bohacheff***, 114 Wis. 2d 402, 338 N.W.2d 466 (1983)).

dotted white lane line separating lane one and lane two on College Avenue.[3] He also testified "he believed that he observed that [touching] another time as well." As the vehicle approached State Highway 41, the driver maneuvered the vehicle into the turn lane in order to turn southbound onto the highway, but the driver, later identified as Kowalewski, entered the turn lane without activating the vehicle's directional signal. Also, as the vehicle pulled into the turn lane, its passenger-side tires touched the solid white lines separating the turn lane from lane one. At that point, Enneper activated his overhead emergency lights and stopped Kowalewski's vehicle.[4]

¶4 On cross-examination, Kowalewski's counsel played Enneper's squad video. Enneper acknowledged that, besides his and Kowalewski's vehicles, there were no other vehicles on the road when Kowalewski moved into the turn lane for the southbound Highway 41 ramp. As to Kowalewski's failure to use her turn signal while changing lanes, Enneper was traveling to the rear of her vehicle, and he testified that Kowalewski should have recognized his vehicle located behind her. Enneper further acknowledged that the video accurately represented what he observed that night.

¶5 In summarizing his reasons for stopping Kowalewski's vehicle, Enneper testified he considered "the totality of the circumstances." Specifically,

[3] "Lane one" was the traffic lane on the inside of road, closest to the median; "lane two" was the traffic lane on the outside of the road.

[4] Enneper testified that he explained to Kowalewski the reason for his stop as follows: "I had observed that she appeared to be drifting in her lane of travel. I also advised her that it appeared she failed to use her turn signal or directional signal when she changed lanes from lane number one into the turn lane." Further, the record includes Enneper's written report regarding the incident, which states that he issued a formal warning to Kowalewski for failure to use a turn signal.

in addition to the aforementioned observations, he took into account that it was 2:30 in the morning on a weekend night. According to Enneper, "Being a Saturday evening, Sunday morning, Saturdays in downtown Appleton are typically a heavy restaurant or bar crowd, and the fact it was near that closing time of those businesses, 2:30 in the morning."

¶6 Kowalewski was arrested and charged with OWI and PAC, contrary to WIS. STAT. § 346.63(1)(a) and (b), respectively, both as first offenses. Appearing before the Town of Grand Chute Municipal Court, Kowalewski entered a not-guilty plea to both charges and simultaneously filed a motion for suppression of evidence, challenging the lawfulness of the traffic stop. On August 21, 2013, a hearing on the motion to suppress and a trial to the municipal court were held. The municipal court orally denied Kowalewski's motion and then found her guilty of both charges.

¶7 On September 5, 2013, Kowalewski appealed to the Outagamie County Circuit Court, and later refiled her motion to suppress.[5] The motion was heard on May 5, 2014. The Town argued Enneper was justified in initiating the stop based solely on his observation of Kowalewski failing to use her turn signal when entering the turn lane, as a violation of WIS. STAT. § 346.34. It further argued the evidence presented was sufficient to establish reasonable suspicion to stop Kowalewski's vehicle to investigate a possible OWI offense. Kowalewski

[5] Oddly, the affidavit filed in support of the suppression motion was from Kowalewski's counsel, not Kowalewski herself, even though the substance of the affidavit was counsel's relaying of facts Kowalewski "has informed your affiant" regarding Kowalewski's understanding, beliefs and feelings concerning what occurred on January 27, 2013. In any event, the circuit court did not mention this hearsay-laden affidavit in its ruling, and it is not relevant to our disposition of this appeal; thus, we do not consider it any further.

argued she did not commit any traffic violation, including a violation of § 346.34, and Enneper did not have the requisite level of suspicion that she was operating while intoxicated in order to lawfully stop her vehicle.

¶8 The circuit court found credible Enneper's testimony regarding the bases for the stop, including Enneper's statement regarding his understanding of the statute governing the use of turn signals. It also concluded Enneper had a reasonable basis to believe Kowalewski committed a traffic law violation with respect to failure to use a turn signal when she entered the turn lane. The court further concluded, "as a secondary basis," that Enneper articulated sufficient facts to support the stop, apparently on the basis that Enneper had reasonable suspicion of an OWI offense being committed. These facts included the "two to three lane deviations" Enneper observed, the day of the week and time of day, and Enneper's training and experience. The court thus denied Kowalewski's motion to suppress, and a written order to that effect was later filed.

¶9 The circuit court subsequently held a bench trial, which was based largely on numerous stipulations by the parties. The circuit court found Kowalewski guilty of both charges, and a final written order of guilt was entered on July 13, 2015.[6] Kowalewski now appeals.

DISCUSSION

¶10 Kowalewski argues Enneper had neither probable cause to believe that she had committed a traffic violation nor reasonable suspicion that she was

[6] Subsequently, an amended order was entered to stay the penalties imposed against Kowalewski pending this appeal.

operating while intoxicated in order to lawfully stop her vehicle to investigate that suspicion. Because we conclude Enneper lawfully stopped the vehicle based upon his conclusion a traffic law violation had occurred, we need not address whether Enneper possessed reasonable suspicion to believe Kowalewski was operating while intoxicated. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (holding that appellate courts need not address other issues when one issue is dispositive of the appeal).

¶11 Review of an order granting or denying a motion to suppress evidence, including one based on the reasonableness of a traffic stop, is a question of constitutional fact involving a two-step standard of review. *See* ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634; ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. First, we uphold the circuit court's findings of fact unless they are clearly erroneous. ***Post***, 301 Wis. 2d 1, ¶8; ***Hughes***, 233 Wis. 2d 280, ¶15. When, as here, "evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the [circuit] court's findings of fact based on that recording." ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. In the second step, we review de novo the application of any findings of fact to constitutional principles. ***Post***, 301 Wis. 2d 1, ¶8; ***Hughes***, 233 Wis. 2d 280, ¶15.

¶12 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***State v. Maddix***, 2013 WI App 64, ¶13, 348 Wis. 2d 179, 831

N.W.2d 778.[7] A traffic stop is a seizure within the meaning of the Fourth Amendment. *See* ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. The State asserts, and Kowalewski agrees, that Enneper's stop of Kowalewski's vehicle was reasonable if Enneper had probable cause to believe Kowalewski committed a traffic violation.[8] *See* ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996); *see also* ***Popke***, 317 Wis. 2d 118, ¶11 ("A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." (citations and internal quotation marks omitted)). Probable cause refers to the quantum of evidence that would lead a reasonable officer to believe a traffic violation had occurred. ***Popke***, 317 Wis. 2d 118, ¶14 (citing ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)).

[7] These constitutional protections are not restricted to criminal cases, but also apply to individuals arrested for civil offenses, ***State v. Wilks***, 121 Wis. 2d 93, 100, 358 N.W.2d 273 (1984), which, in Wisconsin, include first-offense OWI or PAC violations, *see* WIS. STAT. §§ 346.65(2)(am)1., 939.12.

[8] We note that in ***State v. Houghton***, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d, the Wisconsin Supreme Court held that either probable cause or reasonable suspicion is constitutionally sufficient to support all traffic stops. ***Id***., ¶¶29-30. Specifically, "an officer's reasonable suspicion that a motorist is violating or has violated a traffic law is sufficient for the officer to initiate a stop of the offending vehicle." ***Id***., ¶¶5, 79. Further, the court concluded that a police officer's "objectively reasonable mistake of law may form the basis for a finding of reasonable suspicion." ***Id***. (adopting ***Heien v. North Carolina***, 574 U.S. ___, 135 S. Ct. 530, 190 L.Ed.2d 475 (2014), and overruling ***State v. Brown***, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66, and ***State v. Longcore***, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999)). While ***Houghton*** was decided after the circuit court's ruling in this case, it was released over three months prior to when the first brief was filed in this appeal. Neither party, however, cites to or otherwise addresses ***Houghton*** in their briefing for this appeal. Because we find the higher standard of probable cause was met here—which is the only standard the parties argue regarding whether Enneper had a basis to stop Kowalewski's vehicle for a violation of WIS. STAT. § 346.34—we do not address whether reasonable suspicion of such a violation also supports the stop. *Cf*. ***State v. Iverson***, 2015 WI 101, ¶59, 365 Wis. 2d 302, 871 N.W.2d 661.

¶13 Without regard to any indicia of the driver potentially operating while intoxicated, Enneper testified he also stopped Kowalewski's vehicle on the basis that its driver failed to use a turn signal when moving from the lane of traffic into the turn lane. WISCONSIN STAT. § 346.34(1)(a)3. requires that no person "[t]urn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety." Meanwhile, § 346.34(1)(b) states, in relevant part, that "[i]n the event *any* other traffic *may be* affected by the movement, no person may turn any vehicle without giving an appropriate signal in the manner provided in s. 346.35 …." (Emphasis added.)

¶14 On appeal, Kowalewski's arguments against the reasonableness of Enneper stopping her vehicle based on a perceived violation of this law are quite limited. First, in her initial brief, she points to Enneper's acknowledgement during the hearing that there was no other traffic in any lane as somehow overcoming the fact that Enneper's vehicle was on the road behind her in the same lane of traffic. Enneper's vehicle certainly constitutes "any other traffic," and its placement on the roadway behind Kowalewski may have been affected by Kowalewski's movement so as to give rise to a violation of the statute.

¶15 Second, Kowalewski places great import in Enneper's statement at the suppression hearing that an individual should use his or her turn signal "all the time." When asked on direct examination if Enneper thought it would have been appropriate for Kowalewski to have used her turn signal when moving from the traffic lane to the turn lane, given the position of his squad car, Enneper testified "I believe so. People should use their turn directional all the time."[9] Kowalewski

[9] The full question was:

(continued)

latches on to that additional comment, ignores the actual question asked and its context, and notes that the statute requires a signal to be made only when other traffic may be affected. From this, she seems to conclude Enneper must have stopped her not because he believed she violated the actual terms of WIS. STAT. § 346.34, but because he misunderstood the law as requiring drivers to always use their signals when turning or moving between lanes.

¶16 This argument is a red herring. Enneper directly answered in the affirmative the pertinent question regarding whether Kowalewski should have used her signal given the placement of his vehicle. The location of his squad car is a finding of fact impliedly made by the circuit court. In addition, regarding the basis for the stop, the circuit court expressly found Enneper's testimony to be credible in terms of his perception of, and his reliance on, a violation of WIS. STAT. § 346.34. Kowalewski's only attempt to argue against the circuit court's findings in this regard is to invite this court to view the squad car video, asserting it "does not support th[e] conclusion" that Kowalewski's vehicle's movement may have affected Enneper's car.

¶17 In the context of this case, Kowalewski's invitation is improper. This court is not empowered to find facts, *see* ***Gottsacker v. Monnier***, 2005 WI 69, ¶35, 281 Wis. 2d 361, 697 N.W.2d 436 (citing ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980)), and the record reflects the circuit

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> Given where your vehicle was at the time that the defendant made the lane change, do you think – whether it was your vehicle or another vehicle behind you that it would have been appropriate for Miss – for the defendant to use her turn lane – her turn signal when changing lanes from the lane one to the turn lane going onto 41 south?

court did view the relevant portions of the video. Furthermore, Kowalewski has not developed any additional argument that any of the circuit court's factual findings were clearly erroneous. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (court of appeals will not abandon its neutrality to develop arguments for the parties). Accordingly, we conclude the evidence available to Enneper at the time of the stop was sufficient to lead him to reasonably believe a traffic violation had occurred. *See* ***Popke***, 317 Wis. 2d 118, ¶14. To the extent Kowalewski is arguing she did not, in fact, violate § 346.34, that ultimate determination was to be made at trial, not in a suppression hearing, had the Town or State prosecuted such an offense versus merely warning her of one.

¶18 Because we conclude Enneper's stop of Kowalewski's vehicle was constitutional on the basis of him having probable cause to believe a traffic violation had occurred, we need not—and do not—address whether the stop was justified on the basis that Enneper had reasonable suspicion to believe the driver of the vehicle was operating it while intoxicated. *See supra* ¶10; *see also* ***State v. Iverson***, 2015 WI 101, ¶59, 365 Wis. 2d 302, 871 N.W.2d 661.

By the Court.—Orders affirmed.

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