

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 2017

Diane M. Fremgen
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. 2016AP2176
STATE OF WISCONSIN**

Cir. Ct. Nos. 2015TR327
2015TR328

**IN COURT OF APPEALS
DISTRICT IV**

MARQUETTE COUNTY,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. OWENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County:
BERNARD N. BULT, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Matthew Owens appeals the circuit court's judgment convicting Owens of operating a motor vehicle while under the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2015-16 version.

influence of an intoxicant. Owens challenges the legality of a traffic stop that led to evidence of his intoxication. For the reasons below, I reject Owens' arguments and affirm.

Background

¶2 This case presents an unusual fact pattern in which the officer who stopped Owens was attempting to conduct a traffic stop of a vehicle in front of Owens' vehicle. As described further below, while the officer attempted to pass Owens' vehicle on the left, Owens made a left turn in front of the officer. The officer then decided to stop Owens' vehicle.

¶3 At the suppression hearing, the officer testified that he was patrolling in the city of Montello in a marked squad car when he noticed a vehicle behind him that was committing a traffic violation. He changed course to pursue that vehicle, and Owens' vehicle ended up in between that vehicle and the officer. The officer activated his emergency lights, but not his siren, intending to stop the lead vehicle. At about the same time, Owens activated his left turn signal. The officer nonetheless began passing Owens on the left because the officer thought that Owens' vehicle had started moving slightly to the right. As the officer was attempting to pass Owens on the left, Owens made a left turn in front of the officer's vehicle and into an apartment complex parking lot. The officer had to brake "pretty hard" to avoid a collision. He estimated that about five to six seconds elapsed between the time he activated his emergency lights and the time that Owens made the left turn. Believing that Owens had violated a traffic law that requires drivers to yield to the right in response to emergency vehicles, the officer decided to stop Owens.

¶4 A video from the officer's squad car shows events unfolding much as the officer described them, with one important clarification. The video shows that Owens activated his left turn signal about one second before the officer activated his emergency lights.

¶5 Thus, to sum up, the sequence of events was as follows:

- Owens activated his left turn signal;
- The officer activated his emergency lights;
- The officer thought that Owens' vehicle began moving slightly to the right;²
- The officer pulled out to pass Owens on the left;
- Owens turned left in front of the officer into an apartment complex parking lot; and
- The officer had to brake to avoid a collision.

¶6 In circuit court briefing, the County conceded that the ensuing stop could not be justified under the law that the officer had in mind when stopping Owens, WIS. STAT. § 346.19, because that statute applies only when an emergency vehicle has activated its siren, a fact not present here. The County argued, however, that there was reasonable suspicion to stop Owens under a different statute, WIS. STAT. § 346.04(2t).³ The circuit court agreed.

² The resolution and angle of the video make it difficult to say whether the video corroborates the officer's recollection that Owens' vehicle moved slightly to the right before turning left, but the officer's testimony on this point was unchallenged.

³ WISCONSIN STAT. § 346.04(2t) provides:

No operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic

(continued)

Discussion

¶7 “[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.” *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. Courts review the constitutionality of a stop using a mixed standard of review. I uphold the circuit court’s findings of historical fact unless those findings are clearly erroneous. *See State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. I review de novo whether the circuit court correctly applied constitutional principles to those facts. *See id.*

¶8 Owens’ briefing presents a mix of arguments but, as best I can tell, Owens challenges the constitutionality of the stop on two grounds. First, Owens argues that there was no reasonable suspicion. Second, Owens argues that, even if there was reasonable suspicion, the stop was unlawful because reasonable suspicion was “induced” by the officer’s own careless or unlawful driving behavior.

A. Presence of Reasonable Suspicion

¶9 Owens disagrees with the circuit court’s conclusion that there was reasonable suspicion. However, Owens’ briefing lacks what I consider a developed argument on this topic. Quoting WIS. STAT. § 346.04(2t), Owens asserts that he did not violate § 346.04(2t) because he “did not ‘knowingly resist the traffic officer’ and he did stop his vehicle ‘as promptly as safety reasonably permitted.’” Owens does not, however, meaningfully apply reasonable suspicion

officer by failing to stop his or her vehicle as promptly as safety reasonably permits.

standards to all of the circumstances here to explain *why* the officer's observations were insufficient to provide an objective basis to *suspect* a violation. See *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305 (summarizing reasonable suspicion standards).

¶10 I acknowledge that Owens may have honestly believed that he was doing the right thing by executing his left turn and coming to a stop in the apartment complex parking lot. However, for purposes of a reasonable suspicion analysis, what Owens believed is not the issue. As noted, the issue is whether, considering all of the circumstances, the officer's observations provided an objective basis to suspect a law violation. See *id.*

¶11 Owens argues that, when the circuit court concluded there was reasonable suspicion, the court erred by relying on *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675. More specifically, Owens asserts that the facts of *Anagnos* are distinguishable insofar as *Anagnos* involved “building blocks” of reasonable suspicion that are not present here, namely, additional poor driving behaviors. This argument leads nowhere because *Anagnos* involved suspicion of impaired driving, not suspicion of a violation of WIS. STAT. § 346.04(2t), see *Anagnos*, 341 Wis. 2d 576, ¶¶49-61, and the circuit court here did not rely on *Anagnos* as *factually* analogous. Rather, the court relied on *Anagnos* for *Anagnos*'s legal principles, in particular the well-settled principle that “the legal determination of reasonable suspicion is by no means dependent upon the subjective belief of the officer.” See *id.*, ¶60. That is, the circuit court relied on *Anagnos* to conclude that, regardless of the officer's mistaken belief that Owens violated WIS. STAT. § 346.19, the stop could be justified based on a reasonable suspicion that Owens violated a different statute, § 346.04(2t). Owens does not

provide any reason why the legal principles of *Anagnos* and other cases with similar legal principles do not apply here.

B. Officer's Driving Behavior

¶12 I turn to Owens' argument that is based on the officer's driving behavior. This argument, as I understand it, assumes that reasonable suspicion was present here, but asserts that reasonable suspicion does not justify a stop if an officer's careless or unlawful driving behavior played a role in creating the reasonable suspicion. And, Owens contends, that is what happened here. Owens' argument lacks support.

¶13 The one case that Owens cites as authority is *State v. Brown*, 107 Wis. 2d 44, 318 N.W.2d 370 (1982). *Brown*, however, is off topic. *Brown* involved evidence of egregious driving behaviors by an officer in an unmarked vehicle that, the defendant claimed, induced him to exceed the speed limit, resulting in a speeding ticket. *See id.* at 46-47. The issue in *Brown* was *not* the legality of the stop but rather whether, based on these egregious driving behaviors, the defendant could argue "legal justification" as a defense at trial on the speeding violation. *See id.* at 45-46, 50, 53, 55-56. I fail to see why *Brown* would dictate the legality of the stop here.

¶14 Apart from *Brown*, Owens appears to believe that the officer's driving behavior placed Owens in an untenable position in which anything that Owens did would appear suspicious. I disagree. Under the circumstances, Owens had reasonable choices other than executing his signaled left turn. He could have deactivated his left turn signal and moved some distance to the right, or he could have reduced his speed and continued moving forward for at least a few moments

longer. In neither instance would Owens' conduct have created reasonable suspicion.

Conclusion

¶15 For the reasons above, I affirm the judgment against Owens.

By the Court.—Judgment affirmed.

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

