COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP685-CR **Cir. Ct. No. 2016CT76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County: VICKI L. CLUSSMAN, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] David J. Miller appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Miller contends that

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

the circuit court erred in denying his motion to suppress evidence on the ground that the arresting officer lacked reasonable suspicion to perform a traffic stop. For the reasons discussed below, I affirm.

BACKGROUND

¶2 On February 22, 2016 at 3:16 a.m., Waupaca County Deputy Sheriff Matthew Whitaker observed Miller's vehicle making "choppy movements" through a curve. Deputy Whitaker also observed Miller's vehicle "weaving within" its lane, traveling on both the fog line and the centerline. Deputy Whitaker activated his squad's emergency lights and stopped Miller.

¶3 Miller was charged with OWI and operating with a prohibited blood alcohol level, both as third offenses. Miller moved to suppress evidence obtained from the traffic stop on the ground that Deputy Whitaker did not have reasonable suspicion to stop Miller's vehicle. At the suppression hearing, Deputy Whitaker was the only witness to testify, and a DVD of the squad video was introduced upon the stipulation of both Miller and the State. Deputy Whitaker explained that the squad video began recording thirty seconds prior to Deputy Whitaker activating his emergency lights. The court denied the motion, stating:

> I believe based on the testimony that was presented at the motion hearing, as well as the observations on the videotape—and I take into account not just the driving behavior that was observed, but also the time of day being 3:16 in the morning, which I think is significant as well. I will find that the officer did have reasonable suspicion to stop [] Miller's vehicle, so I will deny the motion.

Following the denial of his motion to suppress, Miller pled no contest to OWI, third offense. Miller appeals.

DISCUSSION

¶4 The single issue on appeal is whether Deputy Whitaker had reasonable suspicion to stop Miller's vehicle.

¶5 An investigatory stop is a seizure under the Fourth Amendment to the United States Constitution. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. In order for an investigatory stop to be constitutionally valid, an officer must have at least reasonable suspicion that a crime or traffic violation is being committed, has been committed, or will be committed. *See* ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. The officer's reasonable suspicion must be particularized and objective, and is viewed in light of the totality of the circumstances. ***State v. Walli***, 2011 WI App 86, ¶8, 334 Wis. 2d 402, 799 N.W.2d 898.

¶6 Whether reasonable suspicion exists for a traffic stop is a question of constitutional fact, which presents a mixed question of fact and law on review. ***Post***, 301 Wis. 2d 1, ¶8. This court will uphold a circuit court's factual findings unless they are clearly erroneous, but will independently decide whether those facts meet the constitutional standard. ***Id.***

¶7 Where only documentary evidence is involved, our review of the facts is de novo, rather than for an erroneous exercise of discretion. *See* ***State ex rel. Sieloff v. Golz***, 80 Wis. 2d 225, 241-242, 258 N.W.2d 700 (1977). Both parties agree that the squad video should be treated as documentary evidence. However, as explained above in ¶3, the squad video is not the only evidence presented, and it is clear from the circuit court's decision that the court denied Miller's motion to suppress based on the testimony of Deputy Whitaker and only used the squad video as support. I conclude, therefore, that the primary use of the

video was to assess the credibility of the testimony of Deputy Whitaker. Nonetheless, I have viewed the video de novo.

¶8 I turn first to the question of whether the circuit court's findings are clearly erroneous. The circuit court found that at the time of the investigatory stop, Deputy Whitaker: was aware that the time was 3:16 a.m.; observed Miller's vehicle making choppy movements through a curve; and observed Miller's vehicle weaving within the vehicle's lane, traveling on the fog line and on or over the centerline. These findings are entirely consistent with Deputy Whitaker's testimony. Further, nothing in the video directly contradicts Deputy Whitaker's testimony or the court's findings. The video shows Miller weaving within the lane and driving on the fog line and the centerline. It is not clear from the video whether or not Miller actually crossed the centerline. Accordingly, I conclude that the circuit court's findings are not clearly erroneous.

¶9 Having determined that the circuit court's factual findings are not clearly erroneous, I turn to the final question—whether the facts as found by the circuit court would lead a reasonable police officer to conclude that Miller was committing a crime, in this case operating while intoxicated.

¶10 Relying on ***U. S. v. Lyons***, 7 F.3d 973, 974 (10th Cir. 1993), Miller argues that weaving within a lane of travel is not sufficient to justify an investigatory stop. Miller's reliance is misplaced and unpersuasive.

¶11 In ***Lyons***, a police officer made an investigatory stop after having seen the defendant's vehicle weave three or four times in a single lane. ***Id.*** at 974. Recognizing "the universality of drivers' 'weaving' in their lanes," the court in ***Lyons*** cautioned that allowing weaving alone to justify an investigatory stop may subject many innocent people to seizure. ***Id.*** at 976.

¶12 ***Lyons*** is at most only persuasive in Wisconsin. *See* ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.,*** 2005 WI 111, ¶23, 283 Wis. 2d 555, 699 N.W.2d 205. Here, Miller's use of ***Lyons*** directly contradicts ***Post,*** which is mandatory Wisconsin precedent. The Wisconsin Supreme Court in ***Post*** considered ***Lyons*** and was not persuaded. ***Post***, 2007 WI 60, ¶20.

¶13 In ***Post***, our Supreme Court rejected a call to adopt a bright line rule that weaving within a lane is always sufficient to justify an investigatory stop. ***Id.***, ¶21. The court also rejected a call to adopt a bright-line rule that weaving within a lane alone can never give rise to reasonable suspicion necessary to justify an investigatory stop unless the movements are erratic, unsafe, or illegal. ***Id.***, ¶22. Instead, the court concluded that a vehicle's movements within its lane of traffic are part of the totality of the circumstances that can justify such a stop. *See* ***id.,*** ¶2. The facts that the court found sufficient in ***Post*** are similar to those now before me.

¶14 In ***Post***, the supreme court found the following facts sufficient to give rise to reasonable suspicion justifying an investigatory stop. Post was traveling in a lane that was 22 - 24 feet wide, encompassing an unmarked parking lane bounded by a curb, as well as the lane of travel. The arresting officer observed Post driving at least partially in the unmarked parking lane. As the officer followed Post, the officer observed Post's vehicle traveling repeatedly in a smooth "S-type" pattern within its lane. The officer testified that Post's car traveled approximately ten feet from side to side, coming within 12 inches of the centerline and within six to eight feet of the curb. The S pattern was repeated several times over two blocks. The movement was neither erratic nor jerky, and the car did not come close to hitting any other vehicles or hitting the curb, but Sergeant Sherman testified that the manner of Post's driving was a "'clue that he

may be intoxicated.'" ***Id.***, ¶5. The circuit court held that this was sufficient under the totality of the circumstances to provide reasonable suspicion for the stop. The court of appeals reversed, concluding that slight deviations within a single lane of travel do not give rise to reasonable suspicion. ***Id.***, ¶7.

¶15 In ***Post***, the totality of the circumstances was largely confined to weaving within the lane, although the weaving was substantial and not just "'slight deviations within one lane of travel.'" ***Id.***, ¶29. While the weaving was confined to the lane of travel, that lane was nearly twice as wide as a normal lane of travel. ***Id.***, ¶36. The court also took into account the time of the incident, which was 9:30 p.m., although it was unclear what significance the court attached to that time. ***Id.***

¶16 The driving which led Deputy Whitaker to stop Miller took place at 3:16 a.m. and involved more than merely weaving within the lane of travel. Even if Miller did not cross the centerline, Miller traveled upon both the centerline and the fog line. That is somewhat more aggravated than simply weaving within the lane of travel, just as Post's weaving within his unusually wide lane was more than simply weaving within the lane of travel. In addition, Deputy Whitaker observed Miller making choppy movements while driving around a curve. Taken together, the circumstances here are not particularly close. Deputy Whitaker observed more articulable facts to arouse his reasonable suspicion than the arresting officer observed Post. Accordingly, I conclude that Deputy Whitaker had reasonable suspicion to believe that Miller was driving while under the influence and, therefore, affirm.

CONCLUSION

¶17 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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