

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP713-CR

Cir. Ct. No. 2008CT162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID G. BAAKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ The State of Wisconsin appeals from an order granting David Baake's motion to suppress evidence obtained during a traffic stop

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of Baake's vehicle. The State contends that police validly stopped Baake's vehicle based on reasonable suspicion that Baake failed to yield to a stopped police car contrary to WIS. STAT. § 346.072. Baake responds that the proper legal standard for the stop is whether the arresting officer had probable cause to arrest him for violating § 346.072, and that the arresting officer lacked probable cause because the officer misinterpreted the statute to require Baake to move into the lane for oncoming traffic. We conclude that the record does not establish that the police had either reasonable suspicion or probable cause to support the stop. Accordingly, we affirm.

Background

¶2 The following facts are based on the motion hearing testimony and the circuit court's factual findings. On April 5, 2008, just after midnight, Portage County Sheriff's Department Deputy Robert Wanta stopped a vehicle on Highway 10 in Portage County. That portion of Highway 10 is straight and flat, with one lane of travel in each direction. The two lanes are divided by a broken line, indicating that passing is allowed in either direction. While Wanta was conducting the traffic stop, he positioned his squad car with his left tires in the right lane, creating what he called a "safety lane" of two to three feet on the driver's side of the stopped vehicle. Wanta also activated his emergency lights and his vehicle flashers to alert traffic as to his location on the side of the road.

¶3 After Wanta completed the traffic stop, he observed two vehicles approaching in the same lane as his squad car. He was concerned that the first vehicle was maintaining its position in the same lane of traffic as his squad car, and therefore remained in front of his squad car rather than attempting to enter the vehicle. Wanta then observed the lead vehicle pass his squad car without crossing

the dividing line into the oncoming traffic lane, although there was no oncoming traffic preventing the vehicle from moving over. The second vehicle did cross over the dividing line into the lane for oncoming traffic while passing the squad car, and it then passed the lead car before returning to its lane. Wanta stopped the vehicle that had not crossed into the lane for oncoming traffic, believing that the driver had not yielded to his squad car as required by WIS. STAT. § 346.072. He identified the driver as Baake, and observed indicia of intoxication.

¶4 Based on the evidence obtained during the traffic stop, the State charged Baake with operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, contrary to § 346.63(1)(b). Baake moved to suppress the evidence, arguing the stop was unconstitutional because Wanta acted on a misinterpretation of WIS. STAT. § 346.072. The circuit court granted Baake's motion. The State appeals.

Standard of Review

¶5 “Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact.” *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We review two parts of a constitutional fact: first, we review the circuit court's findings of historical fact for whether those findings are clearly erroneous; then, we independently apply constitutional standards to those facts. *Id.*

Discussion

¶6 The State argues that Wanta did not stop Baake’s vehicle based on a mistaken interpretation of WIS. STAT. § 346.072. First, it argues that § 346.072 requires a motorist to change lanes when approaching a stopped emergency vehicle, even if that requires moving into a lane for oncoming traffic, as long as it is safe to do so. It also argues that Wanta had reasonable suspicion to stop Baake’s vehicle based on his observation that Baake did not operate his vehicle in a safe manner when passing the squad car. Baake responds that the correct standard for our review is whether the State had probable cause to arrest Baake for violating § 346.072 to support the stop.² He contends that Wanta did not have probable cause for the stop because § 346.072 requires only that a motorist slow his or her rate of speed to safely pass a stopped emergency vehicle if there is only one lane of travel in the motorist’s direction. We conclude that based on the plain language of § 346.072 and the facts in the record, neither probable cause nor reasonable suspicion supported the stop.³

¶7 Because a traffic stop is a “seizure” under the Fourth Amendment to the United States Constitution, a traffic stop must be reasonable under the

² Baake asserts that the State argues for the first time on appeal that reasonable suspicion, rather than probable cause, is the proper test for the stop of Baake’s vehicle, and contends that this is an appropriate case for the “waiver” rule. See *State v. Caban*, 210 Wis. 2d 597, 609-11, 563 N.W.2d 501 (1997). Baake does not, however, explain why this case is appropriate for the “waiver” rule. Regardless, because we conclude that Wanta lacked both probable cause and reasonable suspicion for the stop, we need not deem the argument “waived.” Moreover, we note that this issue is more appropriately framed as one of “forfeiture,” not “waiver.” See *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.

³ Because we conclude that neither standard has been met, we decline to resolve the parties’ dispute over which standard is appropriate under the facts of this case. Rather, we address the parties’ arguments under both standards.

circumstances. *See 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.” *Id.* (citations omitted). Thus, while “[a]n officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred,” even in the absence of probable cause “a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed.” *Id.*, ¶¶13, 23.

¶8 We begin with the State’s argument that WIS. STAT. § 346.072 requires that motorists change lanes when passing a stopped emergency vehicle, even if this means driving in a lane designated for oncoming traffic. It argues that § 346.072 only allows reducing speed as an alternative measure if a lane deviation is unsafe, regardless of the number of lanes of travel in the motorist’s direction. We disagree.

¶9 We begin statutory interpretation with the words of the statute to ascertain legislative intent; if the meaning is plain, we end our inquiry. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, our analysis begins with the language of WIS. STAT. § 346.072, which reads as follows:

(1) If an authorized emergency vehicle giving visual signal ... is parked or standing on or within 12 feet of a roadway, the operator of a motor vehicle approaching such vehicle or machinery shall proceed with due regard for all other traffic and shall do either of the following:

(a) Move the motor vehicle into a lane that is not the lane nearest the parked or standing vehicle or machinery and continue traveling in that lane until safely clear of the vehicle or machinery. This paragraph applies

only if the roadway has at least two lanes for traffic proceeding in the direction of the approaching motor vehicle and if the approaching motor vehicle may change lanes safely and without interfering with any vehicular traffic.

(b) Slow the motor vehicle, maintaining a safe speed for traffic conditions, and operate the motor vehicle at a reduced speed until completely past the vehicle or machinery. This paragraph applies only if the roadway has only one lane for traffic proceeding in the direction of the approaching motor vehicle or if the approaching motor vehicle may not change lanes safely and without interfering with any vehicular traffic.

¶10 It is undisputed that WIS. STAT. § 346.072(1)(a) does not apply here because the roadway did not have “at least two lanes for traffic proceeding in the direction of the approaching motor vehicle.” Instead, the applicable provision is paragraph (1)(b), because the roadway had “only one lane for traffic proceeding in the direction of the approaching motor vehicle.” The State contends, however, that paragraph (1)(b), like paragraph (1)(a), requires a motorist to change lanes when approaching a stopped emergency vehicle in his or her lane of travel as long as it is safe to do so. The State argues that under paragraph (1)(b), the motorist must “change lanes” by moving into the lane designated for oncoming traffic if it is safe to do so, and alternatively must slow while passing the emergency vehicle if it is unsafe to move into the lane for oncoming traffic. This is not, however, how the statute reads.

¶11 WISCONSIN STAT. § 346.072, by its plain language, only requires a motorist to change lanes if there are two or more lanes in the motorist’s direction of travel and it is safe to do so. Under WIS. STAT. § 346.072(1)(a), a motorist must “[m]ove the motor vehicle into a lane that is not the lane nearest the parked or standing vehicle or machinery and continue traveling in that lane until safely clear of the vehicle or machinery.” Moreover, paragraph (1)(a) provides two

prerequisites to the lane change requirement: (1) the roadway must have “at least two lanes for traffic proceeding in the direction of the approaching motor vehicle,” and (2) the motorist must be able to “change lanes safely and without interfering with any vehicular traffic.”

¶12 WISCONSIN STAT. § 346.072(1)(b) provides an alternative to changing lanes: the motorist must “[s]low the motor vehicle, maintaining a safe speed for traffic conditions, and operate the motor vehicle at a reduced speed until completely past the vehicle or machinery.” Moreover, paragraph (1)(b) specifies that this requirement applies in the two scenarios where a lane change is not feasible: (1) “if the roadway has only one lane for traffic proceeding in the direction of the approaching motor vehicle,” or (2) “if the approaching motor vehicle may not change lanes safely and without interfering with any vehicular traffic.” Read in its entirety, it is clear that the statute requires a motorist to slow his or her rate of speed while passing an emergency vehicle if there is only one lane in the motorist’s direction or if there are two lanes but a lane change is unsafe. The statute simply does not require a motorist on a roadway with only one lane of travel in the motorist’s direction to move into the lane for oncoming traffic when passing a stopped motor vehicle.

¶13 Here, Baake was proceeding along a roadway with only one lane of travel in his direction, bringing him within the ambit of WIS. STAT. § 346.072(1)(b). He was therefore required to slow his vehicle while passing the squad car. Accordingly, we agree with Baake that the facts known to Wanta at the time of the stop did not amount to probable cause or reasonable suspicion to stop Baake for violating § 346.072 by failing to move into the lane for oncoming traffic when passing Wanta’s squad car. See *Popke*, 317 Wis. 2d 118, ¶11.

¶14 The State also argues, however, that Wanta stopped Baake based on a reasonable suspicion that Baake committed a traffic violation by not passing Wanta's vehicle in a safe manner, which the State distinguishes from Baake's failing to change lanes. The State argues that Wanta testified that he did not believe Baake was operating his vehicle in a safe manner.⁴ However, Wanta never testified that Baake was not driving in a safe manner; instead, he testified about his observations of Baake's driving as follows:

A. Generally when I return to my squad car I can get an idea if somebody is going to slow down or if I get a little concerned that they're coming at my squad car. I became concerned because this vehicle was continuing in its normal lane of travel, close enough that I did not feel comfortable returning to my squad car because I was not sure if the car would be rear-ended or if I might be hit if I tried to return to my car.

....

Q. At the point where the vehicles were closer to your squad car did you observe either the lead vehicle or the second vehicle make any attempt to either slow down or change lanes based on the fact that your squad car was there and the lights were on?

A. I could not tell exactly as far as the change in the speed. My biggest concern was the vehicle never moved over. It continued in its lane of travel, which brought it very close to my squad car, and had I been trying to get into my car, I felt that I, I might have been hit or sideswiped by this vehicle.

....

⁴ The State also points out that after Wanta stopped Baake's car, Wanta only asked Baake why he did not "yield," not why he did not move into the lane for oncoming traffic. Because reasonable suspicion is based on whether the facts known to the officer before conducting the stop would cause a reasonable police officer to suspect that a violation had occurred, we are unconcerned with Wanta's subjective assessment of the reason for the stop. *See State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569.

- A. After the first vehicle passed, it—I could tell that it had not gotten—had not crossed the centerline at all. It had stayed entirely within my lane.

¶15 Thus, Wanta testified that he was “concerned” about Baake’s driving because Baake continued in the same lane of travel as Wanta’s vehicle, which we have concluded is not prohibited by statute. Wanta did not provide any testimony that Baake failed to slow down or that he was traveling at an unsafe speed, or any other details that would support reasonable suspicion of a traffic violation.⁵ *See Popke*, 317 Wis. 2d 118, ¶23 (to establish reasonable suspicion for a stop, “[t]he officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” (citation omitted)). We therefore conclude that there was no reasonable suspicion to support the stop.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁵ The circuit court found that there was “no evidence ... as to speed.”

