

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2007

David R. Schanker
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. 2007AP755-CR

Cir. Ct. No. 2006CM1007

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. FREDERICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ James L. Frederick appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

The issue on appeal is whether the trial court correctly denied Frederick's motion to suppress evidence, which contended that the arresting officer did not have reasonable suspicion to temporarily detain him pursuant to WIS. STAT. § 968.24. We uphold the court's ruling and therefore affirm the judgment of conviction.

¶2 The criminal complaint charged Frederick with operating a motor vehicle while intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a) and with a prohibited blood alcohol concentration (BAC) pursuant to § 346.63(1)(b). The complaint further alleged that Frederick had three prior convictions for OWI. Frederick brought a motion to suppress evidence obtained incident to his arrest. In support, Fredrick contended the arresting officer did not have reasonable suspicion to temporarily detain him. The trial court disagreed and denied Frederick's motion. Thereafter, Frederick pled guilty to the BAC charge and the State dismissed the OWI charge. Frederick appeals from the judgment of conviction, renewing the challenge raised by his motion to suppress.

¶3 The evidence presented at the hearing on Frederick's motion to suppress revealed the following. During the early morning hours of June 6, 2006, Frederick was operating a motor vehicle in the city of West Bend. With him was a passenger, Brian Beck. City of West Bend Police Officer Kurt Bohn observed Frederick make a "wide, sweeping turn" as Frederick turned left, or eastbound, onto Paradise Drive from the intersection with Highway 45. The turn consisted of Frederick traveling into the outside lane and then returning back into the inside lane. Bohn believed that the turn was in violation of the law which requires, in Bohn's words, that a left-hand turn into an intersection must be made "as close as you can to the curve on the left-hand side." *See* WIS. STAT. § 346.31(3)(b).

¶4 Bohn then followed the Frederick vehicle on Paradise Drive, noting that it swayed within its lane of travel. In addition, the vehicle varied its speed a number of times, slowing to approximately twenty miles per hour and then speeding up. At the intersection with Main Street, Frederick stopped for a red light. However, when the light turned green, Frederick remained stopped for approximately fifteen seconds before turning left onto Main Street, again making a wide, sweeping turn. As Bohn followed the vehicle on Main Street, he again observed it sway within its own lane of travel. Frederick then pulled into a restaurant parking lot where Bohn initiated a traffic stop by activating the emergency lights on his police vehicle. After further investigation, Bohn arrested Frederick for OWI. Frederick's passenger, Beck, testified on Frederick's behalf at the motion hearing. Beck challenged Bohn's observations, testifying that Frederick had properly operated his motor vehicle during the route of travel.²

¶5 In a bench decision, the trial court denied Frederick's motion, ruling that the totality of the circumstances provided Bohn with reasonable suspicion to detain Frederick and to conduct the investigation. Frederick appeals.

¶6 We begin by noting some black-letter principles regarding the law of reasonable suspicion. WISCONSIN STAT. § 968.24 codifies the holding of the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). See also *State v. Williamson*, 113 Wis. 2d 389, 399-400, 335 N.W.2d 814 (1983). The statute authorizes a police officer to stop and detain a person in a public place for a reasonable period of time when the officer reasonably suspects that the person has committed, is committing, or is about to commit a crime. Reasonable suspicion is

² Frederick did not testify at the hearing.

dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences therefrom, that the person was committing a crime. *State v. Waldner*, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). A police officer is not required to rule out the possibility of innocent behavior before initiating a *Terry* stop. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763. Suspicious conduct by its very nature is ambiguous and the principal function of the investigative stop is to resolve that ambiguity. *Id.*

¶7 Frederick's approach on appeal is to isolate each incident observed by Bohn and then argue why each incident, standing alone, does not demonstrate reasonable suspicion to permit a *Terry* stop. Like the trial court, we allow that this might be true as to certain segments of Frederick's driving.³ But Frederick's approach is too artificial and narrow. Instead, we properly assess the issue in light of the totality of the circumstances confronting Bohn. This approach reveals a continuing pattern of unusual driving conduct by Frederick, including two episodes which revealed outright violations of WIS. STAT. § 346.31(3)(b) governing left turns at an intersection. As the trial court correctly observed, those violations, standing alone, would warrant a *Terry* stop. Clearly then, when coupled with the other incidents (the varying speeds, the wait at the stop light after the light turned to green, and the swaying within the lane of traffic on Paradise Drive and on Main Street), the quantum of reasonable suspicion was increased, justifying the stop.

³ For instance, we note Frederick's swaying within his own lane of traffic, his varying of speed during his travel on Paradise Drive, and his delay in moving on after the stoplight changed to green at the intersection of Paradise Drive and Main Street.

¶8 Frederick attempts to make much of the fact that Bohn’s written report refers only to Frederick’s wide, sweeping turns, without expressly indicating that these maneuvers included deviations from the lane of traffic. However, Bohn explained that he uses this terminology when describing a turn that deviates from a lane of traffic. The trial court expressly found Bohn to be a credible witness and accepted Bohn’s testimony on this point. In so doing, the court also gave greater weight to Bohn’s testimony over that of Beck, who testified that Frederick’s driving was proper. As a reviewing court, we are obliged to give due regard to the trial court’s opportunity to judge the credibility of the witnesses, and we do not reverse a credibility determination unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2). *See also Mullen v. Braatz*, 179 Wis. 2d 749, 756, 508 N.W.2d 446 (Ct. App. 1993).

¶9 Finally, we note Bohn’s testimony that the situation presented two possible scenarios: a possible drunk driver or a driver in possible distress. Thus, Bohn was confronted with a classic *Terry* situation, entitling him to conduct a temporary stop to resolve the ambiguity. *Anderson*, 155 Wis. 2d at 84.⁴

¶10 We uphold the trial court’s ruling denying Frederick’s motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

⁴ Frederick also cites to the supreme court’s recent decision in *State v. Post*, 2007 WI 60, ___ Wis. 2d ___, 733 N.W.2d 634, holding that deviating within a lane of traffic does not, standing alone, constitute reasonable suspicion for a *Terry v. Ohio*, 392 U.S. 1 (1968), stop. *Post*, 2007 WI 60, ¶2. But, as we have noted, Frederick’s two wide, sweeping turns took him into *adjoining* lanes of traffic. Thus, this is not a *Post* case.

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

