

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2009

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. 2008AP2070-CR

Cir. Ct. No. 2007CT198

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. GIBBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ Steven J. Gibbs appeals from a judgment of conviction for operating while intoxicated, third offense, contrary to WIS. STAT.

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

§§ 346.63(1)(a), 346.65(2)(c), and 346.65(2)(g)2. Gibbs contends that the trial court erred in denying his motion to dismiss the charge based on lack of reasonable suspicion to justify the stop. Because we agree with the trial court that the facts and circumstances preceding the initial stop support a finding of reasonable suspicion, we affirm the judgment.

¶2 The facts as adduced at the motion hearing² were as follows. On January 6, 2007, at approximately 2:23 a.m., city of Neenah police officer, Amy Wagner, noticed Gibbs' vehicle stopped at a red light on Green Bay Road at Winneconne Avenue. The taverns in Neenah close at 2:30 a.m. Wagner noticed that the driver's head was "bobbing"—"[h]is chin was going down toward his chest and then come [sic] back up." Wagner did not recall how many times she saw the driver, later identified as Gibbs, do this. Wagner then turned around to follow Gibbs' vehicle. She testified that Gibbs appeared to be speeding during the one-quarter mile or less that she followed him from the red light to a stop sign at Cecil Street. Wagner also testified that when Gibbs made a right-hand turn to go westbound on Cecil Street, "he accelerated rapidly from the stop sign." Gibbs did not squeal his tires and the rapid acceleration alone would not have prompted Wagner to pull him over.

¶3 After Gibbs turned onto Cecil Street, Wagner observed him "abruptly turn[] into a driveway." She explained, "It caught my attention because it appeared as though he was trying to avoid me, like it was a last minute decision to pull into the driveway, there was no signal or any indication that he had plans

² The motion hearing took place on three separate days: July 6, 2007; August 8, 2007; and October 1, 2007.

on turning into that driveway.” Wagner then turned down a different road from where she could watch Gibbs’ vehicle. She observed Gibbs’ vehicle “rolling backwards in the driveway as if it hadn’t been in park.” At that point, Wagner decided to initiate a traffic stop. She initiated her emergency lights and made contact with Gibbs, during which she detected an odor of intoxicants. As a result of subsequent field sobriety testing, Gibbs was placed under arrest and later charged with OWI and operating with a prohibited blood alcohol content, third offense. Following the denial of his motion to suppress, Gibbs pled no contest to the OWI charge.

¶4 On appeal, Gibbs renews his challenge to the initial stop of his vehicle. Gibbs argues that his driving was not unusual or suspicious—that it is not unusual for a person to bob one’s head during conversation, to accelerate quickly from a stop sign or to pull into a driveway before rolling back a bit. Gibbs argues that these facts, even when taken together, did not provide reasonable suspicion to initiate a stop.

¶5 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). 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. Sec. 968.24. Reasonable suspicion is 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).

¶6 “The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). 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 (1990). Suspicious conduct by its very nature is ambiguous and the principal function of the investigative stop is to resolve that ambiguity. *Id.*

¶7 Here, Wagner testified that at approximately 2:30 a.m., she observed Gibbs’ vehicle and noticed that Gibbs’ head was “bobbing.” It is clear from the officer’s testimony that the manner in which Gibbs’ head was bobbing caused her to “turn[] around to follow his vehicle.” Following that initial observation, Wagner then observed that Gibbs’ vehicle “appeared to be speeding” and “accelerated rapidly” from a stop sign leading her to believe that “he was going faster than the speed limit.” When following behind Gibbs’ vehicle, the officer observed him make an abrupt turn into a driveway with “no signal or any indication that he had plans on turning into th[e] driveway.” Finally, Wagner, who was watching from another road, observed Gibbs’ vehicle start “rolling backwards in the driveway as if it hadn’t been in park.”

¶8 While Gibbs argues that he was “pulling into a friend’s driveway,” there was no way for Wagner to know that at the time of the initial stop.³ Wagner testified that she believed that, based on his quick acceleration from the stop sign

³ When asked, Gibbs informed Wagner that his friend Drew Wasinger lived at the residence where he stopped his vehicle. Wasinger testified at trial that he has lived at the Cecil Street address for thirteen years and has known Gibbs for approximately twenty years.

and abrupt turn into the driveway, Gibbs was trying to evade her. Moreover, when observing Gibbs' vehicle in the driveway, it "roll[ed] backwards ... as if it hadn't been in park." This observation could reasonably lead the officer to believe that Gibbs did not intend to exit his vehicle or to stay at the residence and, therefore, had entered the driveway suddenly as a means of evading contact.

¶19 We conclude that Wagner's observations, when considered together, provided reasonable suspicion justifying the stop. While Gibbs may be correct in his contention that none of these behaviors was particularly unusual or suspicious, the supreme court in *Waldner* explained the cumulative nature of observations supporting reasonable suspicion.

Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

Waldner, 206 Wis. 2d at 58. As in *Waldner*, "[t]hat is what we have here"—facts which accumulate to support reasonable suspicion that Gibbs was driving while intoxicated: driving at 2:30 a.m. (bar closing time), head bobbing, apparent speeding, notable rapid acceleration from a stop sign, an abrupt turn into a driveway with no signal or other evidence of forethought, and finally, rolling backward—which one could reasonably conclude indicated that the driver had only temporarily turned into the driveway until the officer passed by. *See id.* at 53, 58. Once Wagner was confronted with unusual or suspicious behavior,

although generally lawful,⁴ she was entitled to conduct a temporary stop to resolve any ambiguity.

¶10 We uphold the trial court’s ruling denying Gibbs’ motion to dismiss for lack of reasonable suspicion. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

⁴ We note that the officer’s testimony that she was behind Gibbs’ vehicle when he turned abruptly into the driveway without signaling supports a possible traffic violation. *See* WIS. STAT. § 346.34(1)(b) (“In the event any other traffic may be affected by such movement, no person may so turn any vehicle without giving an appropriate signal”).

