

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 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. 2008AP2726-CR

Cir. Ct. No. 2007CT1392

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

WILLIAM A. BOHN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Reversed.*

¶1 SNYDER, J.¹ The State appeals from an order suppressing evidence gathered during a traffic stop of William A. Bohn. The State contends that the circuit court incorrectly determined that the traffic stop was not based upon reasonable suspicion. We agree and reverse the order of the court.

¶2 While patrolling Durand Avenue in Racine at about 1:30 a.m. on August 13, 2007, Deputy Sheriff Chad Schulman observed a vehicle that was stopped in the eastbound lane of traffic. He later learned that Bohn was the driver of that vehicle. Schulman noted that Bohn's vehicle "appeared to be running," because "the lights were on, the brake lights were lit." As Schulman drove past in the opposite direction, he saw a person approach the vehicle on the passenger side, look up and quickly walk away. Bohn then made a u-turn and entered the westbound lane behind Schulman's squad car. Schulman slowed down to let Bohn pass so that he could see the license plate. Bohn did not pass. Schulman slowed until he was nearly at a complete stop, and Bohn then passed by the squad at about "ten, fifteen miles per hour." The posted speed limit in the area is thirty miles per hour.

¶3 Bohn then signaled and turned northbound onto Kearney Avenue and Schulman followed to continue observing. Schulman explained that Kearney has "two lanes, one northbound lane and one southbound lane," and a "parking shoulder," but no markings. Schulman noted that there was plenty of room on the road for traffic in both directions, yet Bohn's vehicle was driving "maybe a foot, foot-and-a-half" from the parked vehicles on the shoulder. Schulman then

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.

observed Bohn cross to the southbound lane with about half of his vehicle width and stay there for “a matter of seconds.” Schulman then saw Bohn deviate back into his lane so far as to “almost strike” a parked car on the shoulder. Schulman described the path of Bohn’s travel as weaving in an S motion. Upon seeing Bohn nearly strike the parked car, Schulman decided to make an investigatory traffic stop. Bohn was ultimately arrested and charged with operating a motor vehicle while intoxicated and with a prohibited alcohol concentration, third offense.

¶4 By pretrial motion, Bohn challenged the legality of the traffic stop for lack of reasonable suspicion and argued that all evidence derived from the stop must be suppressed. The circuit court conducted an evidentiary hearing and by decision dated October 14, 2008, granted Bohn’s motion to suppress. The State appeals.

¶5 Wisconsin courts have consistently followed the U.S. Supreme Court’s decisions regarding the constitutionality of investigatory stops. *State v. Richardson*, 156 Wis. 2d 128, 138, 456 N.W.2d 830 (1990). Police may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). However, in justifying the stop, the officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. Investigative stops are considered seizures within the meaning of the Fourth Amendment; therefore, the stop must be based on a reasonable suspicion in order to pass constitutional muster. *State v. Harris*, 206 Wis. 2d 243, 258-59, 557 N.W.2d 245 (1996). “An inchoate and unparticularized suspicion or hunch will not suffice.” *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279.

¶6 Whether evidence obtained following an investigative stop should be suppressed is a question of constitutional fact. *See State v. Alexander*, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W.2d 909. In reviewing questions of constitutional fact, we will uphold a circuit court’s factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. *Id.* The State does not contest the circuit court’s factual findings, but argues that the circuit court improperly determined that the facts do not rise to the level of reasonable suspicion.

¶7 The burden of establishing reasonable suspicion falls upon the State. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973). Determination of reasonableness is guided by a common sense test that asks whether the facts known to the officer at the time of the stop would lead that officer, given his or her training, to suspect that a crime has occurred or is about to occur. *See State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Reasonable suspicion derives from “specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *See State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729.

¶8 The State argues that Schulman articulated with specificity the factors that gave rise to his suspicion that criminal activity was afoot. First, the State emphasizes that Schulman saw Bohn’s vehicle cross into the southbound lane of traffic and stay there for a matter of seconds before over-correcting his path and nearly colliding with a vehicle parked alongside the northbound lane. WISCONSIN STAT. § 346.05(1) states that on roadways of “sufficient width,” the operator of the vehicle “shall drive on the right half of the roadway....” Schulman’s description of the roadway indicates that Kearney Avenue was wide enough for two lanes of traffic, one in each direction, plus parking on the shoulder.

¶9 Bohn contends that his “imperfect” driving violated no traffic regulation and posed no danger. He challenges the State’s assertion that Kearney Avenue was of sufficient width to show a violation of WIS. STAT. § 346.05 and notes that Bohn’s lane deviation could simply reflect a desire to put more distance between his car and those parked at the curb. His return to the proper lane could mean that the line of parked cars ended and Bohn felt he could safely return to his lane. For the sake of argument only, we will accept that the State did not show that Bohn violated a traffic statute.

¶10 In the alternative, the State asserts, it is not necessary to show that Bohn actually broke any law to prompt the investigatory stop. It directs us to *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), for support. There, Waldner was observed driving very slowly at 12:30 a.m. *Id.* at 53. He stopped his car briefly at an intersection with no stop sign or signal. *Id.* He then turned and accelerated before pulling into a parking spot on the side of the road. *Id.* While parked, Waldner opened the car door and poured out a mixture of liquid and ice. *Id.* Although the “acts by themselves were lawful,” the circuit court held that when taken together, the facts provided reasonable suspicion for the investigatory stop. *Id.* at 58.

¶11 The State argues that similar building blocks of reasonable suspicion were present here. It points to the time of night that the events occurred, Bohn’s car parked with its lights on in an eastbound lane of Durand Avenue, the pedestrian who approached the car and then quickly left when Schulman’s squad car drove past, Bohn’s speed of travel at ten to fifteen miles under the speed limit, and Bohn’s weaving pattern on Kearney Avenue. We agree that, while each factor alone may not support further investigation, the accumulation of factors puts the

evidence at the point “where the sum of the whole is greater than the sum of its individual parts.” *See id.*

¶12 Based on the totality of the circumstances gleaned from the record, we conclude that Schulman provided “specific and articulable facts that warrant[ed] a reasonable belief that criminal activity [was] afoot.” *See Young*, 294 Wis. 2d 1, ¶21. Accordingly, the investigatory stop was legal and Bohn’s motion to suppress should have been denied.

By the Court.—Order reversed.

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

