

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 2009

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. 2008AP2819-CR

Cir. Ct. No. 2008CT892

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

AMANDA Y. SUBERT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Reversed and cause remanded for further proceedings.*

¶1 BRUNNER, J.¹ The State appeals an order suppressing evidence obtained from a traffic stop. The State contends the circuit court erroneously

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

concluded there was no reasonable suspicion for the stop. We agree with the State, concluding there was reasonable suspicion for the traffic stop.

BACKGROUND

¶2 At approximately 1:45 a.m. on April 24, 2008, Appleton Police Officer Jeffrey Miller was observing the Fire Alarm night club's parking lot. He noticed a car make a "very odd" left-hand turn out of the parking lot onto Wisconsin Avenue. Wisconsin Avenue is a four-lane road with a double yellow line in the middle and broken white lines separating the two lanes going each way. When turning out of the parking lot onto Wisconsin Avenue, the car initially turned forty-five degrees to the right, into the inside lane, before swerving to make a left-hand turn.

¶3 Miller followed the car onto Wisconsin Avenue. He noticed the car weaving in and out of the left lane of traffic, at times straddling the broken white line bordering the right lane. Miller observed the car weave over the line three or four times over five or six city blocks.

¶4 Miller followed the car as it turned off Wisconsin Avenue and proceeded one block before turning onto Jardin Street. The car pulled into the driveway of a darkened house and its headlights were turned off. Miller knew the car was registered to an address in Little Chute, not in Appleton, and positioned his vehicle so he could continue observing the car. He did not see anyone enter or exit the car. After a few minutes, the car pulled out of the driveway, and Miller performed a traffic stop.

¶5 Amanda Subert was driving the car. She was ultimately charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a

prohibited alcohol concentration, both as second offenses. Subert moved to suppress evidence obtained from the traffic stop. The circuit court granted the motion, concluding Miller did not have reasonable suspicion for the stop:

Based upon the way I hear the testimony, the crossing of the white line on a lane that she was in certainly wasn't egregious or he would have stopped her then. You're right, the turn into Wisconsin Avenue, although it started to the right and turned to the left, wasn't sufficient grounds, nor was there anything involved when she backed out of the driveway.

DISCUSSION

¶6 To perform an investigatory traffic stop, an officer must have a reasonable suspicion that the person stopped has committed, or is about to commit, a law violation. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. When reviewing questions of constitutional fact, we apply a two-step standard of review. *Id.* First, we will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *Id.* Second, based on the historical facts, we review whether a reasonable suspicion justified the stop de novo. *Id.*

¶7 For an investigatory stop to be constitutionally valid, the officer's suspicion must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion" on a citizen's liberty. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). What is reasonable in a given situation depends upon the totality of the circumstances. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Thus, individual facts that may be insufficient to give rise to a reasonable suspicion when viewed alone may

amount to a reasonable suspicion when taken together. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶8 We conclude there was reasonable suspicion for the traffic stop. After Subert's awkward turn onto Wisconsin Avenue, Miller observed Subert's vehicle weaving for five or six blocks. In the course of weaving, Subert's vehicle crossed into the adjacent traffic lane three or four times, straddling the broken white line dividing the lanes.

¶9 Miller then observed Subert pull into a driveway, turn off her car's headlights, and sit for a few minutes before pulling back out of the driveway. Miller did not see anyone enter or exit the vehicle, indicating the car might be attempting to elude Miller. All of these observations occurred after Subert left a night club at 1:45 a.m. When the circumstances are viewed in their totality, they support a reasonable suspicion that Subert was operating her vehicle while intoxicated. *See Waldner*, 206 Wis. 2d at 58. Miller was therefore justified in performing an investigative stop.

By the Court.—Order reversed and cause remanded for further proceedings.

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

