

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 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. 2008AP2906-FT

Cir. Ct. No. 2008TR2966

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF MEQUON,

PLAINTIFF-APPELLANT,

V.

GLENN H. SIEVERS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
JOSEPH D. McCORMACK, Judge. *Reversed.*

¶1 ANDERSON, P.J.¹ The City of Mequon challenges the trial court's order suppressing evidence gathered after what it concluded was an illegal

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

investigatory stop of Glenn H. Sievers. We reverse because the arresting officer observed Sievers perform a series of ambiguous acts that coalesced into reasonable suspicion.

¶2 On a spring afternoon Officer Darin Selk of the City of Mequon Police Department was on routine patrol when he received a radio call from the department's dispatcher. Selk described the contents of the brief transmission,

The dispatcher said to me they had received a phone call at the police station from an anonymous caller to report an erratic driver. The vehicle in question was now northbound on Port Washington Road from the intersection with Donges Bay Road. The caller described the vehicle as a tan older pickup truck with multiple items in the cargo box or bed of the pickup truck, and the license plate, all he could give were the first two numbers which were 22.

On cross-examination, Selk elaborated that the caller had told the dispatcher the driver "had driven erratically through a parking lot and out on to Port Washington Road."

¶3 Selk located the pickup truck in the northbound lanes and immediately noticed that it was traveling eight to ten miles per hour below the posted speed limit of thirty-five miles per hour. The truck properly stopped for two stoplights on Port Washington Road and, when moving, kept the speed limit eight to ten miles per hour below the posted speed limit. The officer testified that the weather was fine and there were no vehicles immediately in front of the truck.

¶4 The truck turned into a parking lot and was followed by Selk in his marked squad. The truck parked perpendicular to the marked parking spaces, in such a manner as to take up portions of four adjacent stalls. He saw a white male get out of the truck and start to walk, Selk opened the driver's side window and

yelled, “Sir, could I speak with you a moment.” The male walked toward the squad car and said, “Yes, sir.”

¶5 Ultimately Sievers was arrested for a first offense OWI. He filed a motion to dismiss on alternative grounds; either the court lacked personal jurisdiction over him because of an unlawful arrest or the evidence should be suppressed because Selk did not have probable cause for arrest. At the evidentiary hearing Sievers strategically narrowed his attack to the officer’s reasonable suspicion to conduct the stop.² After the arresting officer testified to the events leading to his stopping Sievers in the public parking lot, the trial court asked the parties for written argument.

¶6 In a later bench decision the trial court found that Selk lacked reasonable suspicion to conduct a traffic stop and granted Sievers’ motion to suppress the evidence. The court mentioned an unpublished opinion of this court, *City of Mequon v. Peacock*, No. 2002AP1574, unpublished slip op. (WI App Dec. 11, 2002) that he found was factually indistinguishable from this case and

² Why Sievers was arrested is not apparent from the transcript of the evidentiary hearing which was limited to the narrow issue of Selk’s reasonable suspicion to effectuate a stop. In spite of that, the City asserts in its Statement of Facts, “[u]ltimately, as a result of the officer’s sensory observations of the Defendant during their interaction, Officer Selk arrested the Defendant, leading to this appeal.” This factual assertion is not supported by citation to the record on appeal, *see* WIS. STAT. RULE 809.19(1)(d), because there is no testimony in the record as to the reasons for the arrest. Therefore, we will ignore the assertion because we do not consider facts outside the record. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

adopted the reasoning of that opinion in reaching its decision to suppress the evidence³. Mequon appeals.

¶7 On appeal, Mequon contends that the question is “whether, by rolling down his squad vehicle window and asking the Defendant if he may speak with him for a moment, the police officer restrained the Defendant’s freedom from walking away and thereby ‘seized’ the Defendant for constitutional purposes.” Citing to a series of opinions from the Seventh Circuit,⁴ Mequon asserts that Selk was “completely within the realm of his authority to ask a question of the defendant, and did not use any improper show of authority nor violated any of the Defendant’s rights” when he rolled down the squad’s window and asked Sievers to speak with him for a moment.

¶8 Sievers counters that this was more than a police officer asking an “innocent question.” He points out that the officer was following up on an anonymous tip and had followed him for four blocks. Sievers emphasizes that Selk said more than asking if he could talk to Sievers; he told Sievers that an unidentified caller was concerned about some of his driving actions.

¶9 “A trial court’s determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a

³ Explicitly adopting the reasoning of an unpublished opinion does not run afoul of the WIS. STAT. RULE 809.23(3) prohibition on citing unpublished cases for precedential value. An enterprising and efficient jurist does not need to “rediscover the wheel” to properly do his or her job. Acknowledging and adopting the sound legal reasoning of an unpublished opinion is the practical use of scarce judicial resources.

⁴ *United States v. Seymour*, 472 F.3d 969, 971 (7th Cir. 2007) *cert. denied*, 127 S. Ct. 3022 (No. 06-11293) (Jun. 25, 2007); *United States v. Burton*, 441 F.3d 509, 511 (7th Cir. 2006); and *United States v. Childs*, 277 F.3d 947, 949 (7th Cir. 2002).

question of constitutional fact, subject to de novo review.” *State v. Sisk*, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877. “A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures.” *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. For a traffic stop to comport with the Fourth Amendment, “[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law.” *Id.*

¶10 The law of reasonable suspicion and investigative stops was summarized in *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W. 2d 305,

Thus, the standard for a valid investigatory stop is less than that for an arrest; an investigatory stop requires only “reasonable suspicion.” The reasonable suspicion standard requires the officer to have “a particularized and objective basis” for suspecting the person stopped of criminal activity[.]; reasonable suspicion cannot be based merely on an “inchoate and unparticularized suspicion or ‘hunch [.]’” When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances. Stated otherwise, to justify an investigatory stop, “[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.” However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. (Citations omitted.)

¶11 We disagree with Mequon’s assertion that this was nothing more than a police officer approaching a citizen and asking a question. While police officers are free to address questions to anyone on the streets because police officers, like all other citizens, enjoy the liberty to ask questions, *United States v.*

Mendenhall, 446 U.S. 544, 553 (1980), in this case Selk was following up on an anonymous tip, he was investigating an allegation of unlawful activity.

¶12 The particularized facts that Selk knew at the time he asked Sievers if he could have a word with him were: (1) an anonymous caller had complained that a pickup truck with license plates beginning “22” was driving erratically; (2) the described pickup truck was found on the street identified by the anonymous caller; (3) the truck was travelling eight to ten miles per hour below the posted speed limit; (4) the officer did not observe any erratic driving; (5) the truck obeyed all traffic control signals; (6) the truck properly turned into a parking lot; and, (7) the truck parked perpendicular to the marked stalls, taking up the equivalent of four stalls.

¶13 The facts known to the officer attributable to the anonymous call are not facts that can be relied upon in deciding if he had reasonable suspicion. In *State v. Rutzinski*, 2001 WI 22, ¶1, 241 Wis. 2d 729, 623 N.W.2d 516 and *State v. Williams*, 2001 WI 21, ¶2, 241 Wis. 2d 631, 623 N.W.2d 106, our supreme court considered whether an anonymous cell-phone call from an unidentified motorist provided sufficient justification for an investigative traffic stop. From these cases we know that to be valid, the anonymous tip: (1) should be describing the criminal activity as the tipster is observing it; (2) the anonymous tipster should put his or her identity at risk; (3) the police should have an audio recording of the anonymous tip; (4) the police should independently observe facts giving them reason to suspect criminal activity was afoot; and (5) the police should be able to corroborate the innocent, although significant, details of the tip, which give the tip credibility.

¶14 In this case the tip lacked quality and quantity. The tip contained nothing more than easily observable information; an erratic driver in a pickup truck with license plates beginning with “22” and the direction it was headed. Selk did not independently observe Sievers driving erratically or otherwise showing any signs of driving drunk and could not corroborate the allegations in the tip. The anonymous tip is unsupported by any indicia of reliability other than innocent information. All the anonymous tip gave Selk was the bare report of an unknown, unaccountable informant who neither explained how he or she knew that the driver of the vehicle had been drinking alcohol nor supplied any basis for believing the informant had inside information. This tip is nothing more than an uncorroborated bald assertion of criminal activity and cannot support a conclusion that Selk had the requisite reasonable suspicion when he stopped Sievers.

¶15 The remaining articulable facts and reasonable inferences from those facts, generally reflect innocuous, lawful behavior. The truck travelled eight to ten miles per hour below the posted limit, the driver obeyed all traffic signals and the driver properly turned into a parking lot. We believe that what made Selk suspicious was Sievers travelling below the posted limit and parking perpendicular to the marked parking stalls and obstructing four stalls.

¶16 *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996) teaches:

[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn,

the officers have the right to temporarily detain the individual for the purpose of inquiry. (Citations omitted.)

¶17 Selk had observed Sievers perform a series of acts, each possibly innocent, but when viewed in total the acts rose to articulable facts and reasonable inferences from those facts that warranted investigation. Driving below the posted limit is innocent, even commendable, but when the trip ends with Sievers taking up four parking stalls a reasonable police officer cannot ignore the inference that Sievers might be engaged in unlawful behavior. *See id.* at 61. Because Selk was doing good police work in stopping Sievers to clear up the ambiguity of his actions, we reverse the trial court and deny Siever's motion to suppress.⁵

⁵ We believe that we should explain why we did not follow the sound legal reasoning in *City of Mequon v. Peacock*, No. 2002AP1574, unpublished slip op. (WI App Dec. 11, 2002), especially because the facts are indistinguishable from the facts before us. The issue in *Peacock* was,

Did an anonymous, conclusory telephone tip which was unsupported by any other observations provide an arresting officer wearing a uniform and in a marked squad car with a sufficient articulable and reasonable suspicion to detain a motorist by blocking her possible egress from a driveway and otherwise stopping her from going to her mailbox, returning to her car and driving up her driveway as he investigated that tip?

Brief of Defendant-Appellant at iii, *City of Mequon v. Peacock*, No. 2002AP1574 (WI App Aug. 28, 2002), available at <http://libcd.law.wisc.edu/~wb/will0089/48773082.pdf>. However, the issue in this case was not the validity of the anonymous tip but whether if under the totality of the circumstances the arresting officer had reasonable suspicion to conduct an investigatory stop. The issue requires this court to go down a different path, as we have done.

Because we are not citing to an unpublished case for either its precedential or persuasive value we are not running afoul of WIS. STAT. RULE 809.23(3).

By the Court.—Order reversed.

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

