

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-3491-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD T. TOMASKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

SNYDER, P.J. Ronald T. Tomasko appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI) contrary to § 346.63(1)(a), STATS. Tomasko claims that the trial court erred in finding that the arresting police officer had a reasonable basis for stopping Tomasko's vehicle. We cannot agree, and, thus, we affirm the court's judgment.

At Tomasko's suppression hearing, City of Oshkosh Police Officer Derek Sell testified that at approximately 1:30 a.m. on Thursday, April 2, 1998, he was monitoring traffic when he observed a vehicle stop for approximately ten seconds at a flashing red traffic signal. The vehicle then traveled very slowly into the intersection, pausing for a moment before passing through the intersection. Sell found the driver's behavior suspicious, so he proceeded to follow the vehicle. As Sell followed, he immediately noticed the vehicle weave back and forth in its own lane and into the adjacent parking lane. Sell did not observe the vehicle cross the centerline of the street nor did he notice any parked cars in the parking lane. The weaving occurred at least four times within approximately 300 to 400 feet. Sell also noticed that the vehicle was traveling at approximately twenty miles per hour in a thirty miles per hour zone.

Next, Sell observed the vehicle pull over to the curb and turn its headlights off. After Sell passed the vehicle and turned at the next intersection, he saw the vehicle's lights turn on and the vehicle proceed in the direction it had been traveling. The car continued to weave within its lane, while traveling at twenty miles per hour in a thirty miles per hour zone. Sell then performed a traffic stop. He testified that he believed he had

reasonable suspicion that the driver was most likely under the influence of alcohol because of its weaving in its own lane of travel, slow rate of speed, initially the abnormal amount of time it took to clear the intersection ... and also the incident where it pulled off to the side of the road for a short period of time.

The driver was identified as Tomasko and he was subsequently arrested for OWI.¹

¹ Tomasko does not challenge the officer's probable cause to arrest.

Tomasko moved the court to suppress the evidence, claiming that Sell lacked reasonable suspicion to stop Tomasko's vehicle. The trial court denied Tomasko's motion and he then pled no contest to one count of OWI. Tomasko now appeals.

Tomasko argues that Sell needed reasonable suspicion that a traffic violation had occurred in order to justify the stop. He contends that none of the actions upon which Sell relies for reasonable suspicion constituted traffic violations. Therefore, he concludes, no reasonable suspicion existed for the stop and evidence obtained as a result should be suppressed. We disagree.

"In reviewing a denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence." *State v. Waldner*, 206 Wis.2d 51, 54, 556 N.W.2d 681, 683 (1996). "Whether those facts satisfy the constitutional requirement of reasonableness is a question of law and therefore we are not bound by the lower court's decisions on that issue." *Id.*

"The fundamental focus of the Fourth Amendment, and Wis. Stat. § 968.24 is reasonableness." *Waldner*, 206 Wis.2d at 55, 556 N.W.2d at 684. The question of reasonableness is determined by a commonsense test. *See id.* at 56, 556 N.W.2d at 684. We look to what a reasonable police officer would reasonably suspect, given his or her training and in light of the totality of the circumstances. *See id.* at 56, 58, 556 N.W.2d at 684-85.

In *Waldner*, the defendant challenged the lawfulness of an investigatory stop. *See id.* at 56-57, 556 N.W.2d at 684. Waldner was observed briefly stopping at an intersection where there was no stop sign or signal and then turning on to a cross street and accelerating at a high rate of speed. *See id.* at 53,

556 N.W.2d at 683. He proceeded to stop in a legal, street-side parking space, pour a mixture of liquid and ice out the door, and then walk away from the car, initially ignoring the police officer's request to stop. *See id.* at 53-54, 556 N.W.2d at 683. The court found that standing alone, "these facts ... might well be insufficient"; however, when taken together, the facts "gave rise to a reasonable suspicion that something unlawful might well be afoot." *Id.* at 58, 556 N.W.2d at 685.

In the present case, the trial court relied upon undisputed facts to conclude that Sell acted reasonably in stopping Tomasko, considering the totality of the circumstances. At 1:30 in the morning, Sell observed Tomasko, in an irregular manner, proceed through an intersection after waiting ten seconds, drive ten miles below the posted speed limit of thirty miles per hour, weave in his own lane of traffic while frequently entering the parking lane, stop suddenly, turn off his lights, and then continue to travel once Sell's squad car had passed him.

We agree with the trial court that under these circumstances Sell had a reasonable suspicion that an unlawful activity was occurring. Sell's suspicion was based on "specific, articulable facts and reasonable inferences from those facts." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Contrary to Tomasko's assertions, the totality of the circumstances reveals that Sell did have the requisite reasonable suspicion that a traffic violation was occurring to support an investigatory stop.

Tomasko contends that in the instant case, multiple lawful acts cannot rise to the level of reasonable suspicion necessary to permit an investigatory stop. However, if this were a true statement of the law, "there could never be investigative stops unless there was simultaneously sufficient grounds to make an arrest." *Waldner*, 206 Wis.2d at 59, 556 N.W.2d at 685. "The law of

investigative stops allow[s] police officers to stop a person when they have less than probable cause.” *Id.* In *Terry*, the stop of the defendant was permitted when his conduct, although lawful, was still suspicious when considered in totality. *See Terry*, 392 U.S. at 22-23. Police officers are not required to first eliminate the possibility of innocent behavior before initiating an investigatory stop. *See State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990).

We reject Tomasko’s contention that his multiple lawful actions could not create reasonable suspicion because we look to the totality of all the acts, not each act individually. Thus, we conclude that Sell acted reasonably in initiating a traffic stop of Tomasko.

By the Court.—Judgment affirmed.

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

