

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 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. 99-0048-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER A. URBICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

VERGERONT, J.¹ Roger Urbick appeals a judgment of conviction for operating a motor vehicle while intoxicated contrary to § 346.63(1)(a), STATS., as a second offense, and the trial court's order denying his motion to suppress evidence. Urbick argues the officer did not have the required reasonable suspicion to initiate the *Terry* stop and the evidence resulting from the allegedly unlawful

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

stop should be suppressed. We conclude that the arresting officer did have reasonable suspicion to stop Urbick and we therefore affirm.

BACKGROUND

State Trooper Paul Smith was the only witness at the hearing on Urbick's motion to suppress. He testified that at 2:35 a.m. he was observing traffic from the dirt strip between the two lanes of the interstate highway when he noticed a vehicle go by at a slow rate of speed. Trooper Smith pulled out and followed the vehicle for a few miles. Although most vehicles drive sixty-five to seventy miles per hour on the interstate, this vehicle drove fifty-five miles per hour for the first mile, and then slowed to forty-five miles per hour. During most of the three miles of observation, Trooper Smith noticed that the vehicle drove to the far right of the lane of traffic with its right tires crossed over the painted white stripe on the right side of the roadway. At one point the vehicle pulled into the lane where cars normally drive for a few seconds, but then returned to the far right with its right tires over the white line.

After three miles of observation, Trooper Smith stopped the vehicle to check on the driver and the vehicle. He testified that, in his experience as a state trooper on the early morning shift, when people are driving slow and unusual they are often intoxicated or very tired and falling asleep. Once stopped at the side of the road, the driver, Urbick, exhibited signs of intoxication and failed various field sobriety tests. Trooper Smith arrested Urbick for operating a motor vehicle while intoxicated.

On cross-examination Trooper Smith stated that during his observation of Urbick's driving, he did not see the vehicle leave the pavement,

cross into another lane or impede any traffic; nor did he notice any mechanical problems with the vehicle.

The trial court concluded that Trooper Smith's observations that Urbick was "on the road at 2:35 in the morning, driving on the far right-hand side of the roadway at a speed from ten to twenty miles below the speed limit for a three-mile stretch" established the required reasonable suspicion that Urbick was possibly under the influence of an intoxicant and the stop was therefore proper.

ANALYSIS

The only issue on appeal is whether the trial court erred in concluding that the officer had the requisite reasonable suspicion to detain Urbick.² In reviewing a denial of a motion to suppress, we uphold the trial 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). However, when the facts are undisputed, as they are here, the constitutionality of searches and seizures is an issue that we determine independently. *See State v. Guzman*, 166 Wis.2d 577, 586, 480 N.W.2d 446, 448 (1992).

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *State v. Richardson*, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). In Wisconsin the "reasonable

² The State also argues that the stop was valid as a community caretaker function of the police. *See State v. Goebel*, 103 Wis.2d 203, 208, 307 N.W.2d 915, 917 (1981) (police contact to inquire about car trouble is valid). In light of our decision, we need not consider this alternative theory.

suspicion” standard for a *Terry* stop has been codified in § 968.24, STATS.³ The question of whether the officer’s suspicion was reasonable is a common sense test: was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime. *Waldner*, 206 Wis.2d at 56, 556 N.W.2d at 684. An inchoate and unparticularized suspicion or hunch will not suffice. *Id.* However, the officer is not required to rule out the possibility of innocent behavior. *State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990).

In *Waldner*, 206 Wis.2d at 60, 556 N.W.2d at 686, the supreme court concluded that lawful, but unusual driving may be the basis of an officer’s reasonable suspicion if a “reasonable inference of unlawful conduct can be objectively discerned.” In that case the officer observed a vehicle at 12:30 at night driving slowly, stopping at a corner without a stop sign, accelerating quickly, and then legally parking on the road and pouring some liquid on the street. The court held that the totality of the circumstances coalesced to form the basis for a reasonable suspicion. *Id.* at 53, 556 N.W.2d at 683.

We conclude that the totality of the circumstances in this case also meets the “reasonable suspicion” requirement. Given Trooper Smith’s knowledge and experience, it was reasonable for him to suspect the driver was intoxicated

³ Section 968.24, STATS., provides:

Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person’s conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

when he observed unusual driving (both an unusually slow speed and unusual positioning on the road) that was consistent with that of intoxicated drivers in the early morning hours.

Urbick cites *State v. Williams*, 214 Wis.2d 412, 570 N.W.2d 892 (Ct. App. 1997), as a case where we concluded the officers did not have reasonable suspicion even though they had more information than Trooper Smith did in this case. We do not find *Williams* helpful in analyzing the facts of this case. In *Williams* we based our decision on the premise that an anonymous informant's tip that contains only information readily observable at the time the tip is made cannot provide the sole articulable facts to support an investigatory stop. *Id.* at 422, 570 N.W.2d at 896. Here we are not concerned with an informant's tip, but rather with the direct observations of the officer and his reasonable inferences based on those observations.

By the Court.—Judgment and order affirmed.

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

