COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0073

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

v.

DALE R. MLEJNEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

SNYDER, P.J. Dale R. Mlejnek appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI) contrary to § 346.63(1)(a), STATS. Mlejnek contends that the trial court erred in finding that the arresting police officer had a reasonable basis for stopping Mlejnek's vehicle. We disagree and affirm the court's judgment.

The facts are undisputed. At approximately 9:30 p.m. on May 21, 1998, City of Sheboygan Police Officer Scott Schiuren was patrolling traffic in his squad car when he observed Mlejnek's vehicle exit a parking lot south of the Pork & Beans Bar. According to Schiuren, as Mlejnek proceeded into traffic he made an "exaggerated" turn, swerving in his lane and nearly hitting the curb. Schiuren, who was at a red light when he observed Mlejnek, activated his lights and siren and followed Mlejnek. As Mlejnek continued, Schiuren noticed him "correct[] himself overly" in his lane and then drive with his left tires on the yellow centerline. Mlejnek traveled for three blocks weaving back and forth in his lane with Schiuren following. Mlejnek then turned off of the street and pulled over. When Schiuren spoke to Mlejnek, he suspected him of driving while under the influence of alcohol. Mlejnek was subsequently arrested.

After being charged with OWI, Mlejnek brought a motion to suppress the evidence based upon a lack of reasonable suspicion to initiate a traffic stop. At the suppression hearing, the trial court found that Schiuren "did have specific articulable facts upon which to objectively conclude that the defendant was committing a traffic offense." Mlejnek was then found guilty. He appeals.

In reviewing a trial court's denial of a suppression motion, an appellate court will uphold the circuit court's findings of fact unless they contradict the great weight and clear preponderance of the evidence. *See* ***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 is reasonableness. *See* ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968); ***Waldner***, 206 Wis.2d at 55, 556

N.W.2d at 684. In determining whether a law enforcement officer acted reasonably in detaining a person, we apply an objective test which considers whether the officer had "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime." ***Waldner***, 206 Wis.2d at 56, 556 N.W.2d at 684 (quoted source omitted; alteration in original); *see* § 968.24, STATS. An inchoate and unparticularized suspicion or hunch is not sufficient. *See* ***Terry***, 392 U.S. at 22; ***Waldner***, 206 Wis.2d at 56, 556 N.W.2d at 684.

Mlejnek claims that the totality of the circumstances does not amount to reasonable suspicion under ***Terry***. In making his argument, he first lists the facts that support the traffic stop: his vehicle was seen exiting a parking lot just south of a tavern; in proceeding into traffic, he swerved to the right of the lane in which he was traveling; he drove onto the centerline of the street; he swerved back and forth in his lane; and he did not stop his vehicle for approximately three blocks. We note, in addition, that the court found that Mlejnek also nearly hit a curb upon entering traffic. Moreover, Schiuren testified that based upon his police training, Mlejnek's actions created a seventy percent to eighty percent probability that his driving was impaired by alcohol. Based upon this undisputed evidence, we are satisfied that Schiuren had reasonable suspicion to stop Mlejnek.

However, Mlejnek contends that this evidence is offset by a number of factors. First, Mlejnek finds fault with Schiuren's use of the term "abnormal" which, on cross-examination, he used to describe Mlejnek's initial turn into traffic. He contends that the term was not defined and was a "bald assertion, unadorned by any evidence of objectivity or specificity." While it is true that Schiuren did not define "abnormal," on direct examination he clearly described Mlejnek's initial turn as "exaggerated" and noted that he swerved in his lane and nearly hit a

curb. Based upon Schiuren's testimony, the court found that "the vehicle [made] an exaggerated turn … nearly hitting the curb." We are satisfied that Schiuren presented sufficient evidence to support this finding and that it was a proper consideration in forming his reasonable suspicion.

Next, Mlejnek asserts that we should consider the fact that he never struck the curb, moved outside his lane of traffic or crossed into the oncoming traffic lane. He points out that Schiuren never observed him commit a traffic violation. However, if we adopted Mlejnek's argument, then

> there could never be investigative stops unless there was simultaneously sufficient grounds to make an arrest. That is not the law. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

Waldner, 206 Wis.2d at 59, 556 N.W.2d at 685.

Mlejnek additionally asserts that because he merely "drifted" back and forth within his lane, Schiuren acted subjectively and capriciously in stopping him for alleged "swerving." Mlejnek suggests that because no person can operate a motor vehicle in a geometrically straight line and because officers are likely to apply different subjective standards to determine whether a driver is "swerving" within one's lane, officers should permit drivers the full use of the lane in which they are traveling. We cannot agree. While officers may certainly vary as to what is and is not an acceptable degree of "drifting," the solution is not to create a blanket rule permitting unfettered use of traffic lanes. Instead, we must consider each case on its merits and the fact finder must look to the objective, specific and

articulable facts that are offered in support of the traffic stop. Here, Schiuren has provided such facts which remain undisputed: Mlejnek initially swerved and nearly hit a curb as he entered traffic, he wove back and forth in his lane for three blocks, and he drove on the yellow centerline.

Mlejnek further argues that because Schiuren never proved that the parking lot from which he exited belonged to the nearby tavern, Schiuren could not consider the fact that Mlejnek was leaving the area of a tavern. But regardless of whether the parking lot belonged to the tavern, Schiuren could still make the inference that Mlejnek may have been leaving the bar. In addition, Schiuren considered many factors other than the establishment that Mlejnek was leaving.

Finally, Mlejnek contends that instead of Schiuren "rushing to judgment" when he pursued Mlejnek with his lights and siren activated, Schiuren should have merely followed him at first to confirm or dispel his hunch that Mlejnek was impaired. Mlejnek, however, does not cite any law to support this suggestion. We are convinced that the standard for reasonable suspicion to detain applies at the time of the traffic stop, not when the officer begins his or her initial pursuit. Therefore, we reject Mlejnek's arguments and affirm the trial court's conviction.

By the Court.—Judgment affirmed.

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