

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 2010

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. 2009AP2777-CR

Cir. Ct. No. 2008CT1765

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT W. ABLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Scott W. Able appeals from his conviction for second offense operating a motor vehicle while intoxicated in violation of WIS.

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

STAT. § 346.63(1)(a). The issue on appeal is whether the circuit court erred when it found there was reasonable suspicion to justify an investigatory stop. We affirm, because the arresting officer's suspicion was grounded in specific, articulable facts which, taken together with rational inferences from those facts, lead to the reasonable belief that Able was operating while intoxicated.

¶2 Able filed a motion to suppress after a criminal complaint charging him with the usual two counts accompanying an arrest for operating while intoxicated. When the hearing started, it was established that he was challenging only the traffic stop.

¶3 “A trial court’s determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact....” *State v. Sisk*, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877. When reviewing questions of constitutional fact, we apply a two-step standard of review. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. 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 de novo whether a reasonable suspicion justified the stop. *Id.*

¶4 “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.* “Determining whether there was reasonable suspicion requires [this court] to consider the totality of the

circumstances.” *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999).

¶5 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.)

¶6 The only witness at the evidentiary hearing was Town of Brookfield Police Officer Scott Hibler, who testified that he was on routine patrol on February 21, 2008, at approximately 1:03 a.m. He was stopped at a red light headed north at the intersection of Barker Road and Watertown Road when he saw an SUV traveling east on Watertown Road go through the intersection. The SUV entered the parking lot of Highlander Elite Fitness and Racquet Club which is parallel to Barker Road and is the terminus of Watertown Road.

¶7 Hibler watched the SUV travel through the parking lot to the far eastern edge of the lot’s pavement and make a right-hand turn and proceed to the main entrance of the fitness club. The club was closed at this time. The SUV

stopped at the front entrance “in an awkward position over a total of four different” parking spots. At this time, Hibler entered the parking lot and moved toward the vehicle, which by this time had turned off its headlights. He had decided to approach the vehicle because of a previous break-in at the fitness club and because the City of Brookfield Police Department was investigating several burglaries to a sister fitness club.

¶8 Before the officer got to the SUV, it began driving through the lot with its lights off back toward Barker Road. Hibler followed the vehicle, which turned right onto Barker Road, at which time Hibler was able to see the license plate and began to conduct a registration check on his onboard computer while following the SUV. Hibler initiated a stop and identified Able as the driver.

¶9 In answer to the prosecutor’s final question on direct examination, Hibler summarized why he initiated the traffic stop:

The hour of night or the hour of day combined with the fact that the business is not open and has never been open for as long as I’ve been employed by the Town of Brookfield Police Department, the fact that there are rarely any vehicles in that parking lot. And when I say rarely, the only exception being construction crews that I’ve seen in there on third shift seven, eight years ago. Umm, prior knowledge of burglaries or a burglary to the Highlander Elite Fitness and Racquet Club, as well as prior burglaries that have occurred in the Brookfield—City of Brookfield area at their racquet club owned by the same management or company, umm, I felt it was important as in the course of my duties to, umm, look out for the safety and well being of property and business owners in the Town of Brookfield.

¶10 On cross-examination, Hibler admitted that Able did not commit any traffic or equipment violations. Hibler also agreed with Able that he has used the lot late at night to make U-turns and that the SUV could have pulled into the lot to use a cell phone or a GPS device.

¶11 The result in this case is dictated by *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996), which instructs:

[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.)

¶12 Hibler’s summary of the reasons for the investigative stop is a text book example of specific and articulable facts establishing a reasonable suspicion. First, he considered the time of day; it was close to bar closing time. *See Allen*, 226 Wis. 2d at 74-75 (“[T]he time of day is another factor in the totality of the circumstances equation.”). Second, he considered that, in his experiences, it is rare to see a vehicle in the fitness club’s lot after the business was closed. Third, he considered burglaries to this fitness club and to its sister club in the city of Brookfield. As Hibler mentioned, one of a police officer’s time-honored duties is to conduct business and property checks, especially if there has been previous burglaries. These circumstances could reasonably lead an experienced police officer to suspect that criminal activity is afoot. Hibler was not required to rule out innocent behavior, such as Able was making a U-turn or using his cell phone or GPS device. *See Waldner*, 206 Wis. 2d at 60.

By the Court.—Judgment affirmed.

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

