

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0200-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CT000450

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. MOSS,

DEFENDANT-APPELLANT.

APPEAL from an judgment of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Thomas Moss appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI). He contends that the trial court should have suppressed evidence

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

obtained as a result of a traffic stop because the arresting officer lacked reasonable suspicion to stop his vehicle. We reject this contention and affirm the conviction.

BACKGROUND

¶2 The facts are not disputed. At approximately 12:28 a.m. on November 2, 2001, Officer Steven Moe was on routine patrol near the intersection of Washington Avenue and Cedar Drive in the Village of Plover. The intersection is marked with four-way stop signs. Officer Moe observed a vehicle approaching directly toward him on Cedar Drive traveling at a very slow speed. Concerned that at that hour impaired people will travel at a slower speed, Officer Moe activated his radar unit and clocked the vehicle at seventeen miles-per-hour in a twenty-five-miles-per-hour zone.

¶3 Officer Moe then observed that the vehicle stopped approximately thirty to forty feet from a stop sign, and crept very slowly toward it. The vehicle stopped at the stop sign, turned on its right turn signal, and made a wide right turn. The vehicle's left tires crossed over an imaginary center line. The vehicle then pulled back into the northbound lane on Washington Avenue. It slowly traveled at approximately thirteen miles-per-hour and drifted on two occasions toward the center of the road. Officer Moe felt that the driver of the vehicle might be impaired and activated his emergency lights to stop the vehicle.

¶4 When Moss failed field-sobriety tests, Officer Moe arrested him and took him to a hospital where his blood alcohol content was found to be .229%. Officer Moe issued two citations to Moss for OMVWI, and operating a motor vehicle with a prohibited alcohol concentration.

¶5 Moss moved to suppress evidence concerning his state of sobriety, asserting that the stop was not based on reasonable suspicion. At the motion hearing, Officer Moe testified that Moss did not commit any traffic violations, but he was driving unusually. The trial court denied the motion to suppress, finding that the circumstances in their entirety provided a reasonable suspicion for Officer Moe to investigate whether Moss was operating a motor vehicle while intoxicated. Subsequently, Moss pleaded no contest, was convicted of OMVWI and now appeals.

DISCUSSION

¶6 When reviewing a denial of a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). However, the application of constitutional principles to the facts is a question of law that we decide independently, without deference to the trial court's decision. *State v. Fields*, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. Moss does not argue that the trial court's findings are clearly erroneous. Therefore, we consider only whether the investigatory stop by Officer Moe met constitutional standards.

¶7 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Under the appropriate circumstances, however, a police officer may detain a person to investigate possible criminal behavior without probable cause to make an arrest. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868 (1968). To make an investigative stop of a person, the police must have a reasonable suspicion that criminal activity is afoot, which is a less demanding

standard than probable cause. *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999).

¶8 Moss argues that the investigatory stop was unlawful because Officer Moe made the stop based only upon his subjective determination that the driver of the vehicle approaching him was impaired. Moss maintains that this determination is a hunch resulting only from Officer Moe's initial detection of the speed of his vehicle and the fact that it was 12:28 a.m. An inchoate and unparticularized suspicion or "hunch" will not justify an investigatory stop "because it would lead to unfettered discretion of police officers in the field." *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996). The reasonable suspicion necessary to detain a suspect for investigative questioning must be grounded in specific and articulable facts, and rational inferences drawn from those facts. *Terry*, 392 U.S. at 21-22. The question of what constitutes reasonable suspicion is a common sense test: "under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" *Jackson*, 147 Wis. 2d at 834.

¶9 Moss's argument fails because Officer Moe articulated specific facts which, in their entirety, warrant a reasonable suspicion of unlawful conduct. To determine if reasonable suspicion existed, we consider all the facts known to the officer as the building blocks that lead to reasonable inferences about their cumulative effect. *Waldner*, 206 Wis. 2d at 58. In *Waldner*, the defendant traveled at a slow rate of speed at 12:30 a.m., stopped where there was no stop sign or light, and poured a drink onto the road. *Id.* at 53. Rejecting the defendant's argument that the investigatory stop was based on the police officer's hunch, the court held that those facts taken together gave rise to a reasonable suspicion that defendant could have been intoxicated. *Id.* at 58.

¶10 “Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to resolve quickly that ambiguity.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). The *Terry* court upheld the legality of an investigative stop by a police officer who observed the defendants repeatedly walk back and forth in front of a store window at 2:30 in the afternoon, and then confer with each other. *Terry*, 392 U.S. at 5-6. The court concluded that the investigative stop of the defendants was permissible because, based on the police officer’s personal knowledge, their lawful conduct gave rise to a reasonable inference that criminal activity was afoot. *Id.* at 30. As in *Terry*, where reasonable inferences of criminal activity could be drawn from the legal behavior of walking back and forth in front of a store on a public sidewalk, a vehicle’s stopping significantly before a stop sign, together with other facts, can produce a reasonable inference that the driver is impaired. The fact that defendant’s actions were not unlawful is not determinative of whether there is a reasonable suspicion to justify a stop. *Waldner*, 206 Wis. 2d at 58-59.

¶11 Officer Moe observed a series of Moss’s unusual and suspicious driving behaviors, which taken together warranted further investigation. This included traveling at seventeen miles-per-hour in a twenty-five-mile-per-hour zone at about 12:28 a.m., stopping thirty to forty feet before a stop sign before making a full stop, making a wide turn with the vehicle’s left tires crossing over an imaginary center line, and drifting twice toward the center of the road while traveling at thirteen miles-per-hour. Officer Moe’s stop was based on these specific and articulable facts, not a hunch resulting only from the speed of the vehicle and the time of night. Although Moss questions Officer Moe’s version of some of these facts, the trial court decides the credibility of witnesses and the

weight to be given their testimony. *State v. Baudhuin*, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987).

¶12 Under the common sense test, a reasonable police officer might suspect that 12:30 in the morning is a likely time when a person who has been drinking might be on the road. *Waldner*, 206 Wis. 2d at 58. Moreover, drifting twice within a lane of traffic during a short distance at this early morning hour would have caused a reasonable police officer to reasonably suspect that Moss was intoxicated. Although Moss argues that there were innocent reasons why he was traveling in such an unusual way, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. *Anderson*, 155 Wis. 2d at 84. “If any reasonable inference of wrongful 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.” *Id.* Therefore, since specific and articulable facts are present in this case and a reasonable inference of Moss’s traffic law violation can be objectively drawn from those facts, Officer Moe made a lawful investigatory stop based on reasonable suspicion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

