

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2014

Diane M. Fremgen
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. 2014AP250-CR

Cir. Ct. No. 2012CT93

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY EDWARD MAGDZAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed.*

¶1 CANE, THOMAS, Reserve Judge.¹ Bradley Magdzas appeals a judgment of conviction for operating with a prohibited alcohol concentration, second offense. He argues the circuit court erred by denying his suppression

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

motion because the officer unlawfully stopped his vehicle without reasonable suspicion and because the officer unlawfully asked for his driver's license and questioned him. This court rejects Magdzas's arguments and affirms.

BACKGROUND

¶2 At the suppression hearing, officer Jeffrey Bethards testified that on December 11, 2011, at approximately 2:30 a.m., he received a dispatch about an incident involving a male named Gary Kauther and a Wisconsin state trooper. Bethards explained that, earlier that evening, a state trooper had stopped Kauther and his wife, and ultimately arrested Kauther's wife for operating while intoxicated. Kauther then went to the state trooper's house and threatened the occupants.

¶3 Dispatch gave Bethards a description of Kauther's vehicle and sent Bethards to Kauther's residence on Middle River Road to see if he "could either get [Kauther] as he was coming home or observe him in the area." Bethards testified Middle River Road is a gravel road that has "[v]ery light[]" traffic.

¶4 Bethards pulled into Kauther's driveway and observed several vehicles in the driveway, one of which matched the description he was given of Kauther's vehicle. Bethards also saw that the house was dark. Bethards explained that he did not want to approach the house by himself to look for Kauther "because [Kauther's] behavior at the trooper's house was threatening and dangerous[.]" Bethards exited the driveway and waited on Middle River Road for backup.

¶5 Deputy Cliff Coulthard arrived next. Bethards and Coulthard positioned their squad cars so that Coulthard was facing west on Middle River

Road and Bethards was facing east, and the officers were talking to each other through the windows. Bethards explained that, based on what occurred at the trooper's house, they wanted one more officer present before approaching Kauther's house. They were waiting for their sergeant, who was coming from the trooper's residence.

¶6 Bethards' and Coulthard's squad cars were completely blocking the roadway. As they were waiting for the sergeant, Bethards saw a vehicle approach from behind in his rearview mirror. Bethards initially believed the vehicle was his sergeant, but it was not.

¶7 The approaching vehicle pulled up behind Bethards' vehicle, "stopped and then just started revving the engine loudly." Coulthard moved his squad car to allow the vehicle to pass. The vehicle then "put a blinker on" and turned into Kauther's driveway.

¶8 Bethards believed Kauther was in the vehicle, activated his red and blue lights, and stopped the vehicle. When asked why he believed Kauther was in the vehicle, Bethards explained:

Because of the time frame ... we were waiting for Kauther to come back from that other residence, and the time frame, the time of night, and the activity behind me, that struck me as an angry person revving the engine over and over behind the squad car, in my mind, was a continuation of what was happening – that had happened over at the trooper's house, that he had come home now and sees squads in front of his house and now is angrily revving the engine up and then just pulls into his driveway.

¶9 Bethards "approached the vehicle, thinking that Mr. Kauther was the one driving it based on the aggressive behavior behind me on the road." However, Bethards discovered that Magdzas, not Kauther, was driving the vehicle. When

Bethards made contact with Magdzas, he observed an odor of intoxicants emanating from the vehicle and saw an open intoxicant in the vehicle. At some point soon after the stop, Bethards also recognized Magdzas from prior encounters. Ultimately, Magdzas was arrested for operating while intoxicated.

¶10 The circuit court concluded Bethards had reasonable suspicion to stop Magdzas's vehicle. It reasoned that, at the moment Bethards stopped Magdzas's vehicle,

Deputy Bethards was aware that Mr. Kauther may have engaged in some kind of criminal activity. As the deputy was in the process of looking for Mr. Kauther at about 2:32 a.m., Defendant's vehicle pulled up behind Deputy Bethards, "revved" its engine (suggesting agitation or anger) and then proceeded to pull into Mr. Kauther's driveway. The stop was a valid investigatory stop for purposes of determining whether Mr. Kauther was either driving the vehicle or an occupant inside it.

The court also found that, once Bethards approached the vehicle and made contact with the driver, Bethards observed indicia of impairment that allowed Bethards to extend the traffic stop to conduct an operating while intoxicated investigation. The court denied Magdzas's suppression motion.

¶11 Magdzas pleaded no contest to operating with a prohibited alcohol concentration, second offense, and the circuit court found him guilty. He appeals.

DISCUSSION

¶12 A police officer may conduct a traffic stop when the officer has grounds to "reasonably suspect that a crime or traffic violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Whether reasonable suspicion exists is a question of constitutional fact. *Id.*, ¶10.

We uphold the circuit court’s factual findings unless they are clearly erroneous; however, we independently apply those facts to constitutional principles. *Id.*

¶13 Reasonable suspicion exists when, under the totality of the circumstances, the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect the individual has committed, was committing, or is about to commit a crime or traffic violation. *Id.*, ¶23. Such a stop must be based on more than an “officer’s inchoate and unparticularized suspicion or hunch[.]” *Id.* (citation omitted). Instead, the officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (citation omitted). “[I]f 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.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶14 Magdzas first argues Bethards unlawfully stopped his vehicle without reasonable suspicion based on *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997). In *Young*, an officer stopped the defendant after observing him make “short-term contact” with another individual at 1:15 p.m. in a residential area known for high drug trafficking. *Id.* at 420-21. On appeal, we observed that “stopping briefly on the street when meeting another person is an ordinary, everyday occurrence during daytime hours in a residential neighborhood.” *Id.* at 427, 429. We stated the conduct that the officer considered suspicious was “conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs.” *Id.* at 429-30. We concluded the fact that two individuals met

briefly on a sidewalk during daytime hours in a residential neighborhood known for high drug trafficking did not give rise to a reasonable suspicion that the individuals were engaging in a drug transaction. *Id.* at 430.

¶15 Magdzas argues that, similar to *Young*, Bethards stopped his vehicle simply because Magdzas was in a location that Bethards “considered ‘guilty.’” Magdzas speculates Bethards would have stopped and questioned anyone in the vicinity of Kauther’s home. Magdzas contends his conduct of pulling into the driveway “describes any number of innocent individuals who are placing visits to close friends in this rural area of Wisconsin.” He also emphasizes that Bethards was aware the vehicle that was described as Kauther’s was parked in the driveway and that Bethards had no information that led him to believe Kauther was in Magdzas’s vehicle. Magdzas asserts the facts of the case do not meet the standard of “reasonable suspicion.”

¶16 We disagree. First, the facts and circumstances in this case are entirely different from the situation in *Young*. In this case, officers were at a suspect’s house located off a gravel road in a rural area at approximately 2:30 a.m. The officers were looking for a suspect who had just left a trooper’s residence after threatening the occupants. Although the suspect’s vehicle was one of several parked in the suspect’s driveway, the house was dark. A vehicle then came up behind the officer’s squad car, began “revving” its engine, and turned into the suspect’s driveway. Given these facts and the rational inferences derived from these facts, we conclude that, under the totality of the circumstances, it was reasonable for Bethards to believe that the suspect, who had just threatened the trooper at his house, was returning home and was revving his engine to indicate he was still angry at law enforcement.

¶17 Although Magdzas asserts there was an entirely innocent explanation for his conduct—he simply decided to visit “close friends in this rural area of Wisconsin,” Magdzas overlooks that his visit occurred in the middle of the night and that he revved his engine in response to seeing law enforcement blocking the road at his friend’s residence. Further, although Magdzas argues it would have been reasonable for Bethards to infer his vehicle did not contain the suspect because, “assuming Kauther knew police were looking for him, it doesn’t make sense for him to drive into his driveway right in front of two Sheriff’s Deputies,” Bethards was not required to accept that inference. *See Anderson*, 155 Wis. 2d at 84. We conclude Bethards had reasonable suspicion to stop Magdzas’s vehicle.

¶18 Magdzas next argues Bethards unlawfully asked him for his driver’s license and questioned him. He asserts the questions were not permissible because Bethards had “no suspicion that the driver (Magdzas) of the vehicle had committed, or was about to commit a crime. The stop was to ascertain whether or not the driver was Kauther.”

¶19 Magdzas’s argument appears to assume as fact that Bethards knew Magdzas was not Kauther immediately upon making contact with him. The circuit court, however, did not make that factual determination.²

¶20 In any event, even if we assume that once Bethards came to Magdzas’s driver window he immediately realized Magdzas was not Kauther, Bethards would have still been permitted to ask Magdzas for his driver’s license

² The circuit court found only that “Bethards testified he recognized Defendant ‘fairly soon in the stop,’ [but] he could not recall whether he recognized Defendant before or after he was handed Defendant’s driver[’]s license.”

based on *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462. In that case, an officer stopped Williams' vehicle on the suspicion that Williams was a suspect in a domestic abuse case. *Id.*, ¶¶2-3. Williams was not the domestic abuse suspect. *Id.*, ¶3. On appeal, we first determined, based on the totality of the circumstances, the officer had reasonable suspicion to stop Williams' vehicle on the suspicion that Williams was the domestic abuse suspect. *Id.*, ¶14. We then concluded that, because Williams had been lawfully stopped, it was reasonable for the officer to ask Williams for his name and identification, even if at the time the officer made this request, the officer knew Williams was not the domestic abuse suspect. *Id.*, ¶¶18, 21-22. We concluded the request for identification did not transform the lawful stop into an unlawful seizure. *Id.*, ¶¶21-22.

¶21 In this case, because we concluded Bethards lawfully stopped Magdzas's vehicle, it was reasonable for Bethards to ask Magdzas for his name and identification, even if at the time Bethards made this request, he knew Kauther was not driving. *See id.*, ¶¶18, 21-22. Further, the circuit court found that, while Bethards was asking Magdzas for his driver's license, Bethards immediately observed the indicia of impairment that gave rise to an operating while intoxicated investigation. *See State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999) (If, during a valid traffic stop, an officer becomes aware of suspicious factors or additional information that would give rise to an objective, articulable suspicion that wrongful activity is afoot, that officer may lawfully extend the traffic stop and begin a new investigation). Magdzas does not challenge the circuit court's determination that once Bethards observed the indicia of impairment he was permitted to extend the traffic stop. We therefore conclude that once Bethards observed the odor of intoxicants and open container of alcohol in Magdzas's

vehicle, Bethards was permitted to extend the traffic stop to conduct an operating while intoxicated investigation.

By the Court.—Judgment affirmed.

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

