**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 9, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP515-FT**

**Cir. Ct. Nos. 2013TR4032**
**2013TR4033**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**DANIEL S. IVERSON,**

**DEFENDANT-RESPONDENT.**

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] The State of Wisconsin appeals from an order of the circuit court granting Iverson's motion to suppress evidence and dismiss charges against him for first offense operating a motor vehicle while intoxicated

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

and driving with a prohibited alcohol concentration. Iverson moved to suppress evidence gathered after his vehicle was stopped by Wisconsin State Patrol Trooper Michael Larsen. The circuit court determined that Trooper Larsen lacked sufficient reasonable suspicion to stop Iverson and granted Iverson's motion. I affirm, although upon different reasoning than employed by the circuit court.[2]

## BACKGROUND

¶2 At the hearing on the motion to suppress, Trooper Larsen testified that he was traveling northbound on Rose Street in the City of La Crosse at about 1:00 a.m. on September 18, 2013, when he observed a silver Jeep. While Trooper Larsen was following the Jeep, he observed it drift within its lane toward the centerline and back, and stop at flashing yellow lights at two separate intersections where there was no observed traffic. Trooper Larsen also observed a cigarette butt being thrown from the passenger side of the vehicle. After observing the cigarette butt being thrown from the Jeep, he stopped the vehicle.

¶3 At the suppression hearing, Trooper Larsen testified that he stopped Iverson's vehicle because of the cigarette thrown out of the window. Further, on cross examination, Trooper Larsen testified:

> [P]rior to the cigarette butt being thrown out of the vehicle, [] I didn't feel at that point before that I had the reasonable suspicion to initiate a traffic stop on it. I was [going to] continue to follow the vehicle to observe more information.

[2] *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973) (an appellate court is concerned with whether the circuit court decision being reviewed is correct, rather than with the reasoning employed by the court. If the holding is correct, it should be sustained.)

The State did not argue at the suppression hearing, and does not argue now, that Trooper Larsen had reasonable suspicion to stop Iverson's vehicle for reasons other than the cigarette butt littering.

¶4 The circuit court granted Iverson's motion to suppress evidence resulting from this investigatory stop, stating that littering the cigarette butt was not the real reason for the stop, but rather was a pretext to allow the officer to investigate whether the driver was intoxicated. The State appeals.

DISCUSSION

¶5 The facts in this case are not contested. We review whether those facts meet the constitutional standard independently of the circuit court. *See* ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423.

¶6 WISCONSIN STAT. § 968.24 provides that an officer may stop a person in a public place "when the officer reasonably suspects that such person is committing, is about to commit or has committed a *crime* …." (Emphasis added.) This statute is a legislative codification of ***Terry v. Ohio***, 392 U.S. 1, 20-21 (1968), which provides a constitutional framework for evaluating the conduct of police who briefly "seize" a citizen in investigation of suspected criminal activity. Under ***Terry***, a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21.

¶7 In this case, the only "specific and articulable fact[]" pointed to by Trooper Larsen was that he observed someone throw a cigarette butt from the passenger window of Iverson's vehicle after having followed the vehicle for some time without observing any violation of traffic regulations. The issue, therefore, is

whether throwing a cigarette butt from a car window is a sufficient violation to justify the seizure of an individual without a warrant.

¶8 In its appellant's brief, the State relies upon ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569, quoting: "Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." The problem with the State's reliance upon ***Popke*** is that the offense of which Trooper Larsen suspected Iverson was neither a crime nor a violation of a traffic regulation.

¶9 The State asserts that the offense upon which Trooper Larsen stopped Iverson was littering in violation of WIS. STAT. § 287.81. A violation of § 287.81 is punishable only by a forfeiture of not more than $500. *See* § 287.81(2). A crime is conduct "punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." WIS. STAT. § 939.12. Littering in violation of § 287.81 is thus not a crime.

¶10 Littering in violation of WIS. STAT. § 287.81 is also not a violation of a traffic regulation. Although "[a] person may be arrested without a warrant for the violation of a traffic regulation" under WIS. STAT. § 345.22, a traffic regulation is defined as only "a provision of chs. 194 or 341 to 349." WIS. STAT. § 345.20(1)(b). The State's reliance upon ***Popke*** is thus misplaced.

¶11 The dispositive question before me in this case is whether an articulable suspicion or probable cause of violation of a forfeiture that is not a violation of a traffic regulation is sufficient justification for a warrantless seizure of a citizen.

¶12 In ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991), this court held that "when a person's activity can constitute either a civil forfeiture or a crime, a police officer may validly perform an investigative stop pursuant to [WIS. STAT. §] 968.24." The defendant in ***Krier*** was stopped based upon an anonymous tip that he was driving without a license, which is a civil forfeiture on the first offense, but criminal for subsequent offenses when a license is suspended or revoked. ***Id.*** at 677. The defendant argued that because the anonymous tip did not inform the officer whether the defendant had prior offenses, he was stopped only on suspicion of a forfeiture. ***Id.*** In ruling that the stop was permissible, this court stated: "[j]ust as there is no prohibition for stopping because the behavior may end up being innocent, there is also no prohibition for stopping because the behavior may end up constituting a mere forfeiture." ***Id.*** at 678. The implication from this language that a "mere forfeiture" standing alone does not justify an investigatory stop is inescapable. *See* ***id.***

¶13 In a supplemental brief, after reciting several cases of valid stops based upon suspicion of violations of traffic regulations, which as I have shown are not on point with the facts of this case, the State "concedes [that] it is unaware of authority directly addressing the legality of traffic stops based upon non-traffic forfeiture offenses." The State then attempts to argue policy reasons why the law ought to be different than it is. However, both WIS. STAT. § 968.24 and ***Terry*** are specific in their application to criminal behavior and it is beyond the authority of this court to substitute its own policy preferences, even if I were so inclined.

¶14 Accordingly, I affirm the order of the circuit court.

*By the Court.*—Order affirmed.

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