

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 26, 2016**

Diane M. Fremgen  
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 Nos. 2015AP1688  
2015AP1689  
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2014TR5851  
2014TR5852**

**IN COURT OF APPEALS  
DISTRICT I**

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**CITY OF WEST ALLIS ,**

**PLAINTIFF-APPELLANT,**

**v.**

**TERESA A. MICHALS,**

**DEFENDANT-RESPONDENT.**

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APPEALS from orders of the circuit court for Milwaukee County:  
MICHAEL D. GUOLEE, Judge. *Affirmed.*

¶1 BRASH, J.<sup>1</sup> The City of West Allis (“West Allis”) appeals circuit court orders granting defendant Teresa A. Michals’ motion to suppress evidence

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

obtained from a traffic stop. West Allis argues that the circuit court erred in granting Michals' motion to suppress because the arresting officer had reasonable suspicion to stop her vehicle. We disagree and affirm.

### **BACKGROUND**

¶2 On Sunday, March 16, 2014, at approximately 9:11 p.m., West Allis police officer Jason Komorowski was traveling westbound on Greenfield Avenue towards 70th Street, in the city of West Allis. Komorowski came to a stop at a red traffic signal at the intersection of Greenfield Avenue and 70th Street. While stopped, Komorowski observed Teresa Michals' vehicle stopped three blocks away on Greenfield Avenue at a red traffic signal at 73rd Street facing eastbound. When the light at the intersection of Greenfield Avenue and 73rd street turned green, Komorowski observed Michals' vehicle accelerate quickly towards the location of his vehicle and abruptly swerve three times within its lane. Based on these observations, Komorowski believed Michals was either intoxicated or operating her vehicle in a disorderly manner. Komorowski then turned his vehicle around and began to follow Michals.

¶3 While following Michals, Komorowski ran her vehicle's plates which showed the vehicle registered to a 50th Street address. Michals then made a right turn onto 68th Street. Michals signaled this turn with her vehicle's turn signal. Michals then signaled that she was going to make a turn into an alley behind a senior center. Before Michals made the turn, Komorowski activated his emergency lights and initiated a traffic stop. Thereafter, Michals was charged with refusing to submit to a test for intoxication and for a first offense operating while intoxicated. On April 7, 2014, Michals filed a jury demand.

¶4 Michals subsequently filed a motion to suppress the evidence gathered from the traffic stop on the grounds that, at the time of the stop, Komorowski lacked reasonable suspicion that an offense had been committed. Both Komorowski and Michals testified at the suppression hearing.

¶5 Komorowski testified that he stopped Michals because he believed she was either intoxicated or operating her vehicle in a disorderly manner in violation of WEST ALLIS, WIS., REV. CODE ch. 6, § 6.03(4)(a). Komorowski testified that he relied on the following in reaching this belief: (1) Michals' rapid acceleration from the intersection of 73rd Street and Greenfield Avenue; (2) Michals' three abrupt swerves within her own lane; (3) Komorowski's belief that Michals was attempting to avoid him; and (4) the fact that it was 9:11 p.m., a time Komorowski believed supported his suspicion that Michals might be intoxicated. Komorowski testified that he could not determine the speed at which Michals was driving. Komorowski testified that Michals did not squeal her tires, she did not weave any of her wheels off the ground, and her vehicle was not unusually loud in any way. Komorowski further testified that he did not know if Michals had any business in the area.

¶6 Michals testified that she remembered waiting for the light to turn green at the intersection of 73rd Street and Greenfield Avenue on the evening of March 16, 2014. Michals testified that when the light turned green, she proceeded driving as normal. Michals testified that she was driving a stick shift Mini Cooper S, which has a small wheel base that can easily be damaged by potholes or indentations in the road. Michals further testified that she swerved to avoid potholes and construction on the road to prevent damage to her vehicle. Finally, Michals testified that while she was aware that Komorowski was behind her

before she turned onto 68th Street, she did not make any turns in an accelerated fashion.

¶7 At the conclusion of the suppression hearing, the circuit court granted Michals' motion to suppress, finding that Komorowski lacked reasonable suspicion to stop Michals. Subsequently, the case was dismissed. This appeal follows.

### DISCUSSION

¶8 The question of whether a traffic stop is reasonable is a question of constitutional fact, which is a mixed question of law and fact. *See State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We will uphold a circuit court's factual findings "unless they are against the great weight and clear preponderance of the evidence." *See State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether an investigatory stop meets constitutional standards is a question of law that we review independently. *See State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶9 On appeal, West Allis argues that the circuit court erred when it granted Michals' motion to suppress. West Allis contends that, under the totality of the circumstances, Komorowski had reasonable suspicion to initiate a traffic stop on Michals. We disagree.

¶10 A police officer may make an investigatory stop of a vehicle if he reasonably suspects a driver is violating a traffic law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). The stop of a vehicle, however, must be based on more than an officer's unsubstantiated suspicion or hunch. *Post*, 301 Wis. 2d 1, ¶10. Instead, the officer's suspicion must be

grounded upon “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *Id.* An investigatory stop may be made when an officer observes wholly lawful conduct, “so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.” *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996). We determine the reasonableness of the stop based on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶26.

¶11 In applying these standards, we agree with the circuit court that Komorowski lacked reasonable suspicion to stop Michals. At the motion to suppress hearing, Komorowski gave the following testimony in support of his decision to stop Michals: (1) when the light turned green, Michals’ vehicle accelerated quickly and swerved within her lane three times; (2) based on the turns Michals made after Komorowski began following her and the address to which the vehicle was registered, Komorowski believed Michals was attempting to avoid him; and (3) the time of day was 9:11 p.m. We discuss each of these in turn.

#### **I. Michals’ quick acceleration and swerving within her own lane**

¶12 At the suppression hearing Komorowski testified that when the light at 73rd Street and Greenfield Avenue turned green he observed Michals’ vehicle accelerate quickly and abruptly swerve three times in its lane. Based on these observations, Komorowski stated he believed Michals was either intoxicated or operating her vehicle in a disorderly manner in violation of WEST ALLIS, WIS., REV. CODE ch. 6, § 6.03(4)(a), which states in relevant part:

(4) Disorderly Conduct with a Motor Vehicle.

(a) No person shall, within the City of West Allis, on public or private property, by or through the use of a motor vehicle, motorcycle, snowmobile, minibike,

all-terrain vehicle or any other motorized vehicle, engage in violent, dangerous, abusive, unreasonably loud or otherwise disorderly conduct, including but not limited to unnecessary, deliberate or intentional: spinning of wheels, squealing of tires, revving of the engine, blowing of the horn, causing the engine to backfire, causing the vehicle in motion to raise one or more of its wheels off the ground or causing the vehicle to otherwise be operated in an erratic or dangerous manner under circumstances which tend to cause or provoke a disturbance.

¶13 As to the quick acceleration of Michals' vehicle, Komorowski did not testify that Michals was traveling over the speed limit. Komorowski, in fact, was unable to determine the speed at which Michals was driving. Komorowski testified that Michals' vehicle did not squeal its tires, put any wheels off of the ground, or emit any unusually loud noises. Komorowski further testified that Michals' vehicle did not leave its lane into the parking lane, nor did it hit any curbs. Furthermore, no evidence was presented suggesting that Michals crossed the centerline or that there was any traffic, parked cars, or pedestrians in the area. In sum, Komorowski could not point to any enumerated violation of WEST ALLIS, WIS., REV. CODE ch. 6, § 6.03(4)(a).

¶14 The only testimony that Komorowski provided that could possibly fall under the catchall of WEST ALLIS, WIS., REV. CODE ch. 6, § 6.03(4)(a)—that is, operating a vehicle “in an erratic or dangerous manner under circumstances which tend to cause or provoke a disturbance”—is that Michals swerved three times within her own lane. “[W]eaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop.” *Post*, 301 Wis. 2d 1, ¶2. Komorowski testified that Michals' vehicle did not leave its lane.

¶15 While Michals acknowledged swerving within her own lane, she testified that the reason for doing so was to avoid potholes and construction because she was worried they might damage her car. West Allis could not rebut the presence of potholes or construction on the night of the stop; Komorowski testified that he could not recall if there were any potholes or if any construction barricades were located in the area on the night he stopped Michals. The circuit court found Michals' testimony that she swerved within her own lane to avoid potholes and construction to be credible.

¶16 West Allis relies on *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675, *Waldner*, and *Post* to support their argument that accelerating quickly and swerving within a single traffic lane can give rise to reasonable suspicion that Michals was operating her vehicle under the influence. In the present case, we disagree.

¶17 In *Anagnos*, the driver crossed an elevated median, twice accelerated rapidly, and executed a left turn without signaling. *Anagnos*, 341 Wis. 2d 576, ¶¶57-58. Moreover, in *Waldner*, the driver travelled at a slow rate of speed, stopped at an uncontrolled intersection, accelerated at a high rate of speed, and once he stopped the vehicle, poured liquid and ice onto the ground. *Waldner*, 206 Wis. 2d at 60-61. Finally, in *Post*, the driver appeared to be “moving between the roadway centerline and parking lane,” which “is not slight deviation within one's own lane.” *Post*, 301 Wis. 2d 1, ¶29. There was also evidence of the vehicle's “drifting and unusual driving.” *Id.* In each of these cases, there was evidence of other activity besides accelerating quickly and swerving within a single lane of traffic.

¶18 In the present case, Michals is alleged to have accelerated quickly after a light turned from red to green and swerved three times in her own lane. Michals never hit a curb or median, maintained a single lane of travel, and never deviated into the parking lane. No evidence was presented that Michals crossed the centerline. Furthermore, Michals signaled each of her turns. We conclude, therefore, that Michals' quick acceleration and swerving within her own lane are insufficient on their own to give rise to reasonable suspicion that Michals was operating her vehicle while under the influence or in violation of WEST ALLIS, WIS., REV. CODE ch. 6, § 6.03(4)(a).

## **II. Michals' was not trying to avoid Komorowski**

¶19 West Allis next argues that Komorowski reasonably suspected that Michals was attempting to avoid him. We disagree.

¶20 At the suppression hearing Komorowski testified that after he began following Michals, he ran her plates which showed the vehicle registered to a 50th Street address. Komorowski testified that after he ran her plates, Michals signaled and quickly made a right turn onto South 68th Street and then signaled for a turn into an alley behind a senior center. Komorowski further testified that because the car was not registered to an address in the area and because Michals' turn onto 68th Street would send her in the opposite direction of the address listed to the vehicle, Komorowski believed Michals was trying to avoid him.

¶21 Based on Komorowski's testimony, we conclude that there is no evidence of Michals trying to avoid Komorowski. According to Komorowski,



Michals signaled her turns.<sup>2</sup> When asked on direct examination if he knew how fast Michals was traveling, Komorowski answered no. Moreover, Komorowski's testimony that Michals was traveling in the opposite direction of where the address the vehicle was registered has no significance. Komorowski testified that he did not know what Michals' business was in the area. Furthermore, Michals did not testify as to why she was driving in the area. Any argument as to why Michals was in the area, therefore, is based purely on speculation and not evidence in the record. Accordingly, we conclude Michals' actions are insufficient for Komorowski to reasonably suspect that Michals was trying to avoid him.

### III. Time of day

¶22 Finally, West Allis argues that the time of day being 9:11 p.m. was also an indication that Michals' driving behavior was suspicious. We disagree.

¶23 At the suppression hearing, Komorowski testified that the lateness of the hour, 9:11 p.m. on a Sunday, was a factor in his suspicion that Michals was intoxicated. While the time of day can be a factor in determining whether there is reasonable suspicion to initiate a traffic stop under the totality of the circumstances, it is not enough on its own to give rise to reasonable suspicion. *See Post*, 301 Wis. 2d 1, ¶36. In *Post*, the driver appeared to be "moving between the roadway centerline and parking lane," which "is not slight deviation within one's own lane." *Id.*, ¶29. Moreover, there was also evidence of the vehicle drifting. *Id.* The court in *Post* held that, when taken together with these observations, the

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<sup>2</sup> Initially Komorowski testified that he did not recall if Michals signaled her turns. After a review of his squad car's dash cam video, however, he conceded that Michals did in fact signal all turns.

fact that it was 9:30 p.m. lent further credence to the officer's suspicion that Post was driving while intoxicated. *Id.*, ¶36.

¶24 The totality of the circumstances in *Post*, however, is distinguishable from the present case. In *Post*, the officer relied on a number of observed traffic violations in addition to the time of day to support his suspicion of impaired driving. See *id.*, ¶29. No such traffic violations were observed in the present case. Komorowski's observation at 9:11 p.m. on a Sunday of Michals quickly accelerating, swerving three times within a single lane of traffic to avoid potholes and construction, properly signaling her turns, and traveling a different direction than the address to which her vehicle was registered is not enough to create reasonable suspicion that Michals was either intoxicated or operating her vehicle in a disorderly manner. Based on our review of the record, we find there are no reasonable inferences that suggest criminal activity was afoot. See *Waldner*, 206 Wis. 2d at 57. We conclude that, under the totality of the circumstances, Komorowski lacked reasonable suspicion to believe that Michals was either intoxicated or operating her vehicle in a disorderly manner in violation of WEST ALLIS, WIS., REV. CODE ch. 6, § 6.03(4)(a).

¶25 For all for foregoing reasons, we affirm.

*By the Court.*—Orders affirmed.

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

