

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2005

Cornelia G. Clark
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. 2004AP2744-CR

Cir. Ct. No. 2003CM447

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMY M. YULGA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
FREDERIC FLEISHAUER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Amy Yulga appeals the circuit court judgment convicting her of one count of possession of marijuana. Yulga was convicted after

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

a police officer found marijuana and drug paraphernalia during the course of a traffic stop involving Yulga, who was the driver, and a passenger. Yulga complains that the circuit court erred when it denied her suppression motion. She argues that the initial stop was invalid and that the officer prolonged the stop without reasonable suspicion to do so. We conclude that the initial stop was valid and that Yulga waived her argument that the officer unreasonably prolonged the stop. We affirm the circuit court's judgment.

Background

¶2 The State charged Yulga with possession of marijuana and possession of drug paraphernalia after a police officer found these items in her vehicle during the course of a traffic stop. Yulga moved to suppress all evidence seized from the vehicle, arguing that the evidence was obtained in violation of her constitutional rights.

¶3 At the suppression hearing, the officer testified that while he was on patrol at 2:30 a.m. in April 2003, he observed a vehicle that failed to use its turn signal at an intersection after the vehicle had been at the intersection for "some time." After the vehicle turned and proceeded on its way from the intersection, the officer observed the vehicle drift toward the fog line.²

¶4 The officer stopped the vehicle, illuminated it with his spotlight, and noticed that the passenger in the vehicle immediately began smoking a cigarette.

² The officer testified on direct examination that the vehicle crossed the fog line. However, when cross-examined on his written report of the incident, the officer stated that the vehicle had only drifted toward the fog line.

¶5 The officer walked up to the vehicle. The passenger “seemed to sink” back into his seat, did not acknowledge the officer’s presence, did not make eye contact with the officer, and appeared to try to pay as little attention to the officer as possible.

¶6 Yulga was the driver of the vehicle; at some point, the officer identified Yulga by her driver’s license. The officer explained to Yulga why he had stopped her. Once the officer was able to observe Yulga, he determined there was no reason to believe she was intoxicated. The officer returned to his patrol car and then returned to Yulga’s vehicle to issue Yulga a written five-day warning notice for failure to notify the department of motor vehicles of an address change.

¶7 After explaining the five-day notice to Yulga, the officer informed Yulga that she was free to leave. As Yulga was about to leave, the officer asked her for consent to search her vehicle. She declined to give consent. The officer then told Yulga he wanted to speak with the passenger to find out if the passenger had been consuming alcohol, because the passenger was under 21 years old.

¶8 The officer asked the passenger to step out of the vehicle. The officer asked the passenger to walk to the front of the vehicle and told the passenger that he was going to conduct a pat-down search. After conducting the pat-down search, the officer asked the passenger to submit to a preliminary breath test. The officer then asked the passenger if he had anything that the officer should know about. In response, the passenger produced a black bag. After the officer questioned the passenger about what was inside the bag, the passenger handed the officer the bag and said “here.” Inside the bag, the officer found an amber-colored plastic bottle containing what he believed to be marijuana. The officer arrested Yulga’s passenger, then searched Yulga’s vehicle. He found

marijuana and drug paraphernalia under the driver's seat, and Yulga admitted that these items were hers.

¶9 Before the circuit court, Yulga argued that the initial stop was invalid because the officer did not have reasonable suspicion of a traffic violation under the standards set forth in the statutes that apply to turn signal and traffic lane violations. In addition, Yulga argued that the stop became unconstitutional because she was forced to remain at the scene while the officer questioned her passenger, after she had received her warning. The circuit court denied Yulga's motion to suppress. Yulga then pled guilty to one count of possession of marijuana.

Discussion

¶10 The temporary detention of an individual during the police stop of a vehicle, even if for a brief period of time and for a limited purpose, constitutes a seizure within the meaning of the Fourth Amendment. *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. In reviewing a circuit court's determinations pertaining to a search or seizure, we uphold a circuit court's findings of historical fact unless they are clearly erroneous. *See State v. Williams*, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. However, whether the circumstances of a search or seizure meet constitutional standards is a question of law for our *de novo* review. *See id.*

¶11 The officer who stopped Yulga was the only witness at the suppression hearing, and the circuit court made no fact findings pertinent to our resolution of this case. Accordingly, we assume fact finding in a manner that supports the circuit court's decision. *See State v. Pallone*, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568 (when an express finding is not made, appellate

courts normally assume the circuit court made findings in a manner that supports its final decision). Moreover, the record provides no reason to think that the circuit court disbelieved any of the officer's testimony.

Initial Stop

¶12 Yulga first argues, as she did in the circuit court, that the officer who stopped her lacked reasonable suspicion to initiate the stop. We disagree.

¶13 An officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (No. 01-2988-CR), *cert. denied*, 540 U.S. 877. The question of what constitutes reasonable suspicion is a common-sense test. *Colstad*, 260 Wis. 2d 406, ¶8. The test is an objective one, and the suspicion must be grounded in specific, articulable facts along with reasonable inferences from those facts. *Id.*

¶14 At the time the officer made the stop here, he knew the following: the time was approximately 2:30 a.m.; Yulga's vehicle was stopped at an intersection for "some time"; the driver of the vehicle failed to signal a turn at the intersection; and, after the vehicle turned and proceeded on its way, it drifted toward the fog line.

¶15 Yulga focuses on whether her failure to signal and her drifting in her lane toward the fog line gave the officer reasonable suspicion for the stop. In the circuit court, Yulga argued that the officer's observations were not sufficient for him to form a reasonable suspicion under the corresponding statutory traffic regulations, and her argument on appeal is similar.

¶16 We need not determine whether the officer could form a reasonable suspicion that Yulga committed a statutory signal or lane violation because we conclude that, based on all the circumstances, the officer could have formed a reasonable suspicion to stop Yulga for driving while impaired by intoxicants. The officer knew four facts that, cumulatively, provided a reasonable basis for him to suspect the driver might be impaired. The time was 2:30 a.m., the driver stopped at an intersection longer than the normal brief stop, the driver failed to signal her turn, and the driver drifted in her lane. While far short of probable cause, these facts could lead a reasonable officer to suspect intoxication. Accordingly, the initial stop of Yulga's vehicle was valid.

Yulga's Argument that the Officer Unreasonably Prolonged the Stop

¶17 Yulga next argues that the officer unreasonably prolonged the stop when he held her at the scene to investigate her passenger without any reasonable suspicion of a further law violation by her or her passenger. This is a shift from her argument in the circuit court, where she asserted that she was unconstitutionally seized, not because the officer lacked reasonable suspicion, but because she was forced to remain at the scene while the officer investigated her passenger. Because Yulga did not argue in the circuit court that the officer lacked reasonable suspicion to detain and investigate her passenger, she has waived this argument on appeal. *State v. Copening*, 103 Wis. 2d 564, 571, 309 N.W.2d 850 (Ct. App. 1981) (this court has frequently said that “even the claim of a

constitutional right will be deemed waived unless timely raised in the trial court”” (citation omitted)).³

¶18 Although we need not address whether the officer possessed reasonable suspicion to continue to investigate Yulga’s passenger, we nonetheless note that the officer knew the following at the time he extended the stop for the purpose of investigating Yulga’s passenger:

- Yulga failed to signal at an intersection after being stopped at the intersection for “some time”;
- After Yulga’s vehicle departed the intersection, it drifted toward the fog line;
- The time was approximately 2:30 a.m.;
- The passenger immediately began smoking a cigarette upon the initial stop;
- The officer identified Yulga by her driver’s license;
- The officer determined that Yulga was not intoxicated;
- Yulga’s passenger was under the age of 21;⁴
- The passenger seemed to sink down in his seat;
- The passenger did not acknowledge that the officer was there; and

³ As best we can tell from her brief, Yulga has abandoned her argument that her constitutional rights were violated because she was forced to remain at the scene for investigation of her passenger, regardless of whether the officer had reasonable suspicion for continued additional investigation of her passenger. Accordingly, we need not address that argument.

⁴ Although the officer’s testimony does not tell us how he knew at this point that Yulga’s passenger was under 21, the officer testified that he continued investigating the passenger after issuing Yulga’s warning notice because the officer wanted to “find out if [the passenger] had been consuming alcohol since he was under 21 years of age.” Yulga has never argued that the officer lacked a basis for his assertion that Yulga’s passenger was under the age of 21.

- The passenger did not make eye contact with the officer.

¶19 While we need not decide whether these facts rise to the level of reasonable suspicion, we note that a reasonable officer could not help but wonder about the passenger's behavior. First, the hour was late, 2:30 a.m., a time when a higher percentage of persons on the road have been drinking alcohol or using illegal drugs. Second, upon being stopped, the passenger immediately lit a cigarette, suggesting he might have been attempting to disguise an odor in the car or on his breath. Third, the passenger sunk down in his seat and ignored the officer, avoiding eye contact. While there may be innocent explanations for these actions, they also constitute both articulable and suspicious facts. *See State v. Young*, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997) (“[C]onduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity.”).

Conclusion

¶20 We conclude that the officer's initial stop of Yulga was valid. In addition, we conclude that Yulga waived her argument that the officer unreasonably prolonged the stop without reasonable suspicion of further unlawful activity. Accordingly, we affirm the circuit court's judgment.⁵

⁵ The circuit court relied, in part, on *State v. Matejka*, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891. Neither Yulga nor the State discusses *Matejka* on appeal and we agree with their implicit agreement that the case is not on point. The court in *Matejka* addressed the issue of “whether a driver's consent to the search of a vehicle justifies the warrantless search of a passenger's belongings within the vehicle.” *Id.*, ¶18. Concluding that it did, the *Matejka* court analyzed that type of search as a “hybrid” of a probable cause automobile search and a third-party consent search. *Id.*, ¶21. The court based its conclusion on principles underlying the two types of searches, such as reduced Fourth Amendment protections afforded automobiles and third-party authority over property. *Id.*, ¶¶22, 30, 36. In this case, Yulga did not consent to the search and

(continued)

By the Court.—Judgment affirmed.

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she does not argue that police lacked probable cause to search her vehicle when the search of the vehicle began. Rather, the issues here are limited to the stop and subsequent temporary detention.

