

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2016

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. 2016AP248

Cir. Ct. Nos. 2015TR7555
2015TR8099

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF EAU CLAIRE,

PLAINTIFF-APPELLANT,

V.

DAVID EUGENE PHELPS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County:
WILLIAM M. GABLER, SR., Judge. *Reversed and cause remanded for further proceedings.*

¶1 HRUZ, J.¹ The City of Eau Claire appeals an order granting David Phelps's motion to suppress evidence, resulting in the dismissal of a citation for first-offense operating a motor vehicle while intoxicated (OWI). We agree with the City that reasonable suspicion of an OWI offense justified the underlying traffic stop. Accordingly, Phelps's constitutional rights were not violated, and we reverse the order and remand for further proceedings necessary to resolve this case.

BACKGROUND

¶2 At the suppression hearing, officer Michael McClain testified that on a Sunday at about 2:30 a.m., he was patrolling downtown Eau Claire in a marked squad car. He observed a vehicle, later determined to be driven by Phelps, driving ahead of him on the road. McClain testified the vehicle was traveling southbound on Farwell Street, a four-lane thoroughfare, at about twelve to fifteen miles per hour in a thirty-five mile-per-hour zone with its right-hand turn signal on for approximately a block and a half. For some portion of this time, the vehicle was traveling in the left-hand lane of traffic. McClain then observed the vehicle make a wide right turn going immediately into the left-hand lane of westbound Lake

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

Street instead of turning into the nearest right-hand lane on Lake Street.² McClain did not observe anything remarkable about the conditions of the right-hand lanes on Farwell Street or Lake Street and described them as level, flat and clear of any debris.

¶3 McClain turned into the right-hand lane of Lake Street, merged to the left-hand one, and continued to follow directly behind Phelps's vehicle now going westbound. McClain observed the vehicle's speed as about twelve to thirteen miles per hour in a thirty mile-per-hour zone. McClain also observed the vehicle activate its left turn signal for three-quarters of a long bridge on Lake Street before making a left turn. After McClain made the same turn, he initiated a traffic stop.

¶4 Phelps admitted at the hearing that he had turned wide into the left-hand lane of Lake Street from Farwell Street. Phelps testified he did so because he observed potholes filled with gravel and dirt on Farwell Street in addition to broken glass in the intersection of the right lanes of both Farwell Street and Lake

² The record seems to indicate this turn began from the left-hand lane of Farwell Street. Phelps himself testified he "started in the right-hand lane ... and [he] went to the left lane, southbound on Farwell" once he observed potholes in Farwell Street's right-hand lane. He also testified to there being broken glass in the intersection of the right lanes of both streets. He never testified he eventually got into the right-hand lane on Farwell Street. Rather, Phelps testified he "tr[ie]d to get back into the right lane" of Farwell with his right turn signal on, but executed the right turn onto Lake Street in order to avoid potholes and glass in the intersection and glass in the right-hand lane of Lake Street. McClain never testified about the lane *from which* Phelps turned, only describing the turn onto Lake Street as "wide" and "improper" because it went directly into the left-hand lane on Lake Street. No finding of fact was made regarding the lane from which the turn was made, and the City's argument makes no reference to Phelps's testimony on this point. Our conclusion that the stop was supported by reasonable suspicion is the same regardless of the lane from which Phelps began his right turn, although a turn from one left-hand lane into another left-hand lane would constitute a more troubling turn under the totality of the circumstances.

Street. Because of this, he explained the wide right turn was intended to avoid damaging his vehicle, a small hybrid car.

¶5 The circuit court granted the suppression motion, holding that McClain’s observations only rose to the level of “a hunch.” While it termed Phelps’s turn into the left-hand lane of Lake Street a “technical violation,” the court stated it was “generally aware” of a policy by Eau Claire law enforcement “not to issue tickets for people turning into wrong lanes when they turn left or right.” Due to this “policy” and the fact that the court itself had never seen a prosecution for any such turn violation, it determined the turn here was, in “Eau Claire County, ... indicative of nothing.” The court further concluded that Phelps’s unusually slow speed was neither illegal nor did it cause any imminent danger or impede traffic, and that leaving a turn signal on for a long period of time only indicated common inattentiveness. The City now appeals the order granting the motion to suppress.

DISCUSSION

¶6 Review of a motion to suppress evidence presents a question of constitutional fact, which involves a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. The circuit court’s findings of historical fact are upheld unless clearly erroneous. *Id.* Meanwhile, the court’s application of constitutional principles to those findings is reviewed de novo. *Id.*

¶7 WISCONSIN STAT. § 968.24 codifies *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), and authorizes law enforcement to detain a person when, in light of their training and experience, specific, articulable facts create a reasonable suspicion that wrongful activity is taking place. See *State v. Williamson*, 113 Wis. 2d 389, 399-400, 335 N.W.2d 814 (1983).

[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, *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.

State v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (emphasis added); *see also State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729.

¶8 We conclude, based on the totality of the circumstances preceding the traffic stop, McClain reasonably suspected Phelps was driving while impaired by an intoxicant. *See Post*, 301 Wis. 2d 1, ¶¶22, 26 (under totality of circumstances, observed driving behavior need not be “erratic, unsafe, or illegal to give rise to reasonable suspicion”). We agree with the circuit court, however, that this is a close case.

¶9 First, Phelps twice traveled at unusually slow speeds in thirty and thirty-five miles-per-hour speed limit zones with there being no other traffic ahead of him. *See State v. Waldner*, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (1996) (“lawful but suspicious conduct” may accumulate to create a reasonable inference of unlawfulness, including driving at an unusually slow speed). Second, Phelps activated his turn signal on two separate occasions for relatively long periods of time. *See id.* Third, Phelps maintained his unusually slow speed in a manner that impeded McClain’s travel. *Cf.* WIS. STAT. § 346.59(1) (“No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or is necessary to comply with the law.”). Fourth, Phelps executed a wide right turn into the left-hand lane of Lake Street, thereby appearing to have violated WIS.

STAT. § 346.31(2).³ Finally, the stop occurred at 2:30 a.m. on a Sunday, and it is commonly known that the incidence of people driving drunk tends to be at its highest at “bar time.” *See Post*, 301 Wis.2d 1, ¶36; *see also* WIS. STAT. § 125.32(3). These facts, taken together and all of which happened in a relatively short span of time, allow a trained police officer to reasonably conclude that Phelps’s driving behavior was unusual and the result of impairment by intoxicants, thus justifying an investigative stop.

¶10 The nature of the wide right turn violation was significant. Motorists performing a right turn are required to begin in the right-hand lane and execute a turn into the nearest right-hand lane; Phelps failed to follow this rather commonly known rule. *See* WIS. STAT. § 346.31(2). Phelps might not have been ticketed for disregarding this rule of the road, but this indifference does not remove the turn from consideration within the totality of the circumstances as suspicious behavior.⁴ *See Post*, 301 Wis. 2d 1, ¶22.

³ WISCONSIN STAT. § 346.31(2) states:

Both the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway. If, because of the size of the vehicle or the nature of the intersecting roadway, the turn cannot be made from the traffic lane next to the right-hand edge of the roadway, the turn shall be made with due regard for all other traffic.

⁴ Phelps contends we should instead construe the circuit court’s conclusions regarding Eau Claire’s enforcement of this offense as one of judicial notice. *See* WIS. STAT. § 902.01(2)(a). This argument is meritless. Neither party requested judicial notice to be taken before the circuit court’s holding, and the circuit court based its evaluation on personal knowledge rather than anything readily verifiable by a reference to authority that a county or city policy on traffic citations overrode state law. *See State v. Peterson*, 222 Wis. 2d 449, 457-58, 588 N.W.2d 84 (Ct. App. 1998).

¶11 Phelps’s other arguments err in three respects. First, Phelps describes his driving behavior as displaying an “abundance of caution,” particularly regarding his slow speed. It should be noted no vehicles other than those of Phelps and McClain were observed on either street that could have prompted Phelps’s slow speed. Phelps ignores the fact that factors which appear innocuous in isolation may, in totality, create a reasonable inference of suspicious conduct, including the operation of a motor vehicle while intoxicated. *See Waldner*, 206 Wis. 2d at 60-61. McClain did not need to consider and rule out, for example, whether Phelps was an unusually cautious or unskilled driver before investigating a possible OWI. *See id.* at 60 (citing *Anderson*, 155 Wis. 2d at 84). Phelps’s behaviors were indicative of driving while intoxicated, especially at 2:30 in the morning.

¶12 Second, Phelps’s bald assertion that WIS. STAT. § 346.59(1) is not intended to apply to law enforcement vehicles is unavailing and unsupported. McClain’s squad car constitutes “traffic” for the purposes of § 346.59(1), and Phelps was impeding it with his slow speed and other behavior. While traveling south on Farwell Street, Phelps merged into the left-hand lane but activated his right directional signal for some period of time, all the while with McClain in the right lane and travelling behind Phelps’s vehicle. *Cf.* WIS. STAT. § 346.08 (governing overtaking and passing vehicles on the right). Under these circumstances, it is reasonable to conclude Phelps was impeding McClain’s vehicle, as Phelps’s directional signal *signaled* he was intending to move into the only lane in which McClain could have passed him—the right-hand lane. Phelps also continued to drive very slowly on Lake Street while in the left lane after the turn.

¶13 Third, Phelps claims the condition of the road was responsible for his wide right turn and other “cautious” driving conduct and, furthermore, that the circuit court’s conclusion on reasonable suspicion implicitly justifies such a finding. On this point, however, McClain testified that the condition of Farwell Street and the intersection where the seemingly unlawful right turn occurred was level, flat, and clear of any debris. Phelps’s different observations of the road may call into question the reliability of McClain’s own recollection, but we must look to the objective facts available to law enforcement—not to Phelps—at the time of the stop in determining its reasonableness. *See State v. Baudhuin*, 141 Wis. 2d 642, 647, 650-51, 416 N.W.2d 60 (1987). Importantly, the circuit court did not question McClain’s credibility or the accuracy of his testimony on this or any issue, instead concluding that McClain’s observations did not constitute reasonable suspicion.

¶14 We conclude McClain could have “objectively discerned” a “reasonable inference of wrongful conduct” under the totality of the circumstances, *see Anderson*, 155 Wis. 2d at 84, so as to make an investigatory stop for an OWI offense. As discussed above, McClain pointed to specific, articulable facts in his testimony, and he was not acting on merely an “inchoate and unparticularized suspicion or ‘hunch.’” *See Post*, 301 Wis. 2d 1, ¶10 (quoting *Terry*, 392 U.S. at 27). There is no need to reach the City’s alternative arguments that there was reasonable suspicion Phelps committed a traffic offense or that suppression would be an improper remedy in this case. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate court need not reach multiple issues if one is dispositive).

By the Court.—Order reversed and cause remanded for further proceedings.

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

