

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2017

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 No. 2016AP1808-CR

Cir. Ct. No. 2015CT1080

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON M. SWIECICHOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
DAVID W. PAULSON, Judge. *Reversed and cause remanded for further proceedings.*

¶1 NEUBAUER, C.J.¹ Brandon M. Swiecichowski appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

second offense, contrary to WIS. STAT. § 346.63(1)(a). Swiecichowski contends that the circuit court erroneously denied his motion to suppress evidence because the officer who stopped him lacked reasonable suspicion that he committed a traffic infraction. We agree and thus reverse the judgment and remand for further proceedings.

¶2 At a suppression hearing, testimony was adduced that on September 12, 2015, at 12:49 a.m., Officer Jacob Buer of the Village of Caledonia Police Department was stationed at Nicholson Road just south of Dunkelow Road. The roads in the area were “closed to through traffic” because of a road paving project. There were barricades at each intersection along with signs that said, Buer believed, “closed to through traffic.” The signs “might have had blinking lights,” but Buer was unsure; he recalled that the signs “were reflective.” Buer assumed that the Village “DPW” had erected the signs based on it being a “State-funded project,” the patrols he had done, and what his supervisors had him doing.

¶3 Dunkelow Road was closed east and west of Nicholson Road for about one hundred yards in each direction, while Nicholson Road was closed from Northwestern Avenue (south of Dunkelow) until about one-half-mile or mile of Four Mile Road. Buer described the area as “[p]art residential, part industrial.” When asked how many houses were on the closed roads, Buer testified that, although it was “just a guess,” he thought that south of Dunkelow Road there were fourteen or fifteen residences, probably another four or eight residences on each side of Dunkelow Road, and then there were about ten houses north of Dunkelow Road on Nicholson Road. He also testified that Swiecichowski lived on an offshoot to one of the roads closed to through traffic. Those who lived along such an offshoot road, Buer noted, would have had to use the closed roads.

¶4 Buer described the roads as in “very poor shape.” The roads were “pretty much all gravel,” with “torn up” asphalt and “steep curbs” that prevented one from traveling more than ten miles per hour without damaging his or her vehicle.

¶5 Buer was stationed in this area because the police department had received a number of complaints that drivers were violating the closed-to-through-traffic signs and were traveling too fast. At 12:49 a.m., Buer saw a vehicle being driven through the area marked as closed to through traffic. Buer’s attention was drawn to the vehicle because the area did not receive a lot of traffic with the roads being closed to through traffic. Buer ran the car’s registration, and the car was registered to an owner who lived on Arthur Avenue in the City of Racine, which was about seven or eight miles away. Buer “thought it was suspicious that a vehicle from the city was driving through a road closed sign in that stretch of roadway.” Because “the vehicle was traveling through the road closed sign and it wasn’t from the area,” Buer thought the driver “was violating the road closed sign,” and, thus “initiated a traffic stop.”

¶6 At Nicholson Road, just north of Dunkelow Road, Buer stopped the vehicle, and he identified the driver, through his driver’s license, as Swiecichowski. Swiecichowski told Buer that the car belonged to his fiancée. Swiecichowski lived in the area. The road on which Swiecichowski lived—Lynndale Drive—was not closed, but the road leading up to the road where he lived—Nicholson Road—was closed. Buer acknowledged that at the time of the traffic stop, he did not know if Swiecichowski’s vehicle was passing through the closed road area or was going to stop at a house in the closed road area. During the course of the traffic stop, Buer suspected that Swiecichowski might be

intoxicated and requested that he submit to field sobriety testing, which he failed and ultimately led to his arrest for OWI.

¶7 In support of Swiecichowski's motion to suppress the evidence recovered during the course of the traffic stop, he argued that the detention was illegal because the State had not established that the sign was illuminated so as to legally close the road, nor had it established who had erected the sign—a construction company or the Village—so as to give it force of law. If the State had met its burden on those threshold issues, then it had not established that there was a legal justification for the stop. Swiecichowski also argued that Buer lacked probable cause or reasonable suspicion to stop Swiecichowski for violating the closed-to-through-traffic sign. It was not the case that Buer had followed Swiecichowski through the closed roads and then onto an open road, which would have established that he violated the closed-to-through-traffic sign. Swiecichowski had a right to be on the closed road if, for example, he was visiting someone or, as the case was, lived in the area.

¶8 The circuit court denied the motion to suppress. The court pointed out that Buer did not have information certifying that these signs were “completely in conformity with the statute,” but it was enough that he believed that the roads were closed to through traffic. Further, Buer had reasonable suspicion to believe that Swiecichowski was violating the closed-to through-traffic sign. In addition to the signs, the court relied on the time of night, the condition of the roads, and the fact that Swiecichowski's vehicle was registered to someone who lived outside the construction area. The latter was the most “critical” factor. If the vehicle had been registered to someone within the construction area, then there would not have been a reasonable basis to justify the stop, but under these facts there was “enough to meet the somewhat lower level of reasonable suspicion.”

¶9 Swiecichowski moved for reconsideration of his motion to suppress, but the circuit court denied the motion.

¶10 Subsequently, Swiecichowski pleaded guilty and was sentenced, which was stayed pending appeal.

¶11 WISCONSIN STAT. § 346.04(2) provides, “No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer.” A traffic stop is generally reasonable if the police have probable cause to believe that a traffic violation has occurred or reasonable grounds to suspect that a traffic violation has been or will be committed. *State v. Iverson*, 2015 WI 101, ¶44, 365 Wis. 2d 302, 871 N.W.2d 661. The police ““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.”” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). A stop based on an “officer’s ‘inchoate and unparticularized suspicion or ‘hunch’” is insufficient. *Id.* (citation omitted). The question is one of “common sense”: whether the totality of the facts and circumstances “would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a” traffic violation. *Id.*, ¶13. In this case, thus, the question is whether Buer had reasonable suspicion to believe that Swiecichowski had disobeyed or was going to disobey the traffic sign indicating that the road was closed to through traffic.

¶12 Review of that question is one of constitutional fact, that is, a mixed question of law and fact to which a two-step standard of review is applied. *Id.*, ¶8. The circuit court’s findings of historical fact will not be disturbed unless clearly

erroneous, but the application of those facts to constitutional principles is reviewed independently of the circuit court. *Id.*

¶13 The facts as found by the circuit court were insufficient to reasonably warrant the stop of Swiecichowski's vehicle based on him committing or being about to commit a violation of the closed-to-through-traffic sign.² It is undisputed that the road was not closed to traffic. Rather, it was open, but only to local traffic. As the State points out in its brief, areas that are closed to local traffic “may be used at the point of closure if access beyond the closure is allowed for traffic originating within, or *having destination on, the portion of the roadway closed to through traffic.*” Wisconsin Manual on Uniform Traffic Control Devices: Supplement to the Manual on Uniform Traffic Control Devices § 6F.09 (2011), <http://wisconsindot.gov/dtsdManuals/traffic-ops/manuals-and-standards/wmutcd/wismutcd.pdf>. (Emphasis added.)

¶14 The testimony at the suppression hearing was, based on Buer's “guess,” that there were ten houses north of Dunkelow Road on Nicholson Road. However, Buer also testified that those going to an offshoot of the closed roads, such as Swiecichowski, would also have to travel on the closed roads. There was no testimony about the number of houses on the road or roads connected to Nicholson Road, such as where Swiecichowski lived, and had no other road for entry. Suffice it to say that there were many residences in the area that were closed to through traffic such that one traveling to those locations had as their

² We assume, without deciding, that the closed-to-through-traffic sign was an “official traffic sign.” Thus, we do not address Swiecichowski's “threshold argument.”

“destination ... the portion of roadway closed to through traffic.” Wisconsin Manual on Uniform Traffic Control Devices, *supra*.

¶15 Indeed, in addition to the fact that there were many houses, any number of persons might have had a reason to access the area closed to through traffic, even a person whose vehicle was registered to an owner who lived outside the construction area. A person delivering pizza to the area, visiting parents or a relative, attending a Saturday night party, dropping off a date, or returning home using someone else’s car, as Swiecichowski had done, among many other reasons, would have had a reason to access the area closed to through traffic. True, the police are not required to rule out innocent explanations before initiating a traffic stop, but there still must be a reasonable inference of wrongdoing. *State v. Williams*, 2001 WI 21, ¶46, 241 Wis. 2d 631, 623 N.W.2d 106 (citation omitted). Buer had an “inchoate” suspicion that Swiecichowski was going to drive through the area because his vehicle was registered to someone outside the construction area. Buer could have easily acquired more information to transform his hunch—or seen it dispelled—if he simply followed Swiecichowski to see where he went.

¶16 The other factors the court cited as contributing to reasonable suspicion that Swiecichowski was not appropriately using the road for local access are, at best, neutral. The fact that the closed roads were in poor condition only confirmed what the closed-to-through-traffic signs indicated. It is a redundant factor and does not suggest that a driver is about to violate these signs. The time of night also does not lead to a reasonable inference that Swiecichowski was about to violate the closed-to-through-traffic signs. In fact, one might argue that a more rational inference is that because of the time of night only a person who is headed to a residence in the construction area would be using those roads. The circuit

court did not find any other evidence of possible wrongdoing by Swiecichowski prior to the stop.

¶17 The circuit court’s decision would allow an officer stationed at a location such as this to seize any driver who was using a car that was registered to a person outside the construction area. Such generalized suspicion does not translate into unbridled police authority to stop and detain all such vehicles entering into a residential area accessible only through travel on a closed road. Buer, as we have said, could have easily gathered more information to support a reasonable suspicion that Swiecichowski was on the closed road to go through the area, rather than for local access.

¶18 Therefore, the circuit court erred in denying Swiecichowski’s motion to suppress. The judgment is reversed and the matter remanded for further proceedings consistent with this opinion.

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

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

