

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 20, 2017

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. 2017AP536-CR

Cir. Ct. No. 2016CT553

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. ZEMANOVIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
MICHAEL P. MAXWELL, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Dennis Zemanovic appeals from a judgment of conviction for operating a motor vehicle while intoxicated, second offense. He

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

argues the circuit court erred in denying his motion to suppress based on its determination that the arresting officer in this case had reasonable suspicion to pull him over for a traffic stop. For the following reasons, we affirm.

Background

¶2 The arresting officer was the only witness to testify at the hearing on Zemanovic's suppression motion, and his relevant testimony is as follows.

¶3 At approximately 3:30 a.m. on April 17, 2016, the officer observed Zemanovic exit Highway 43 and head northbound onto Highway 83 in the Village of Mukwonago. When the officer "ran [Zemanovic's] plates," he learned that the registration for the vehicle was "out of Eagle." The officer "thought it was kind of weird that [Zemanovic] turned on Henry because it goes into the lake, it doesn't go to Eagle." This gave the officer "a little bit of suspicion that something was going on," prompting the officer to turn his vehicle around and "tr[y] to see if I could spot [Zemanovic] again."

¶4 When the officer located Zemanovic again, he observed that Zemanovic "started veering in his lane left and right. He actually veered over the fog line a few times, and the time before I stopped him, he was actually riding the shoulder for a bit." The officer testified that based on his experience, this driving was consistent with the driver being impaired. Observing the vehicle make "the kind of motions it did" around that time of day led the officer to believe the operator of the vehicle was "possibly impaired."

¶5 On cross-examination, the officer acknowledged that based upon review of the squad car video that was played during the hearing, Zemanovic "touched" the white fog line "a couple times" and at one point "was riding" the

line, but that Zemanovic did not actually “cross over” it. The officer acknowledged that the road Zemanovic was driving on “has curves in it at times.” He further agreed with defense counsel that the route Zemanovic took upon exiting off of Highway 43 “was, in fact, on the way to ... the Village of Eagle.” The officer also testified that the total amount of time he followed Zemanovic was about one minute and forty-five seconds.

¶6 The officer performed a traffic stop on Zemanovic, and Zemanovic was ultimately charged with operating a motor vehicle while intoxicated, second offense. He filed the motion to suppress evidence which is at issue in this case, arguing, as on appeal, that the officer lacked the reasonable suspicion necessary to lawfully stop Zemanovic. Noting that it was a “close call,” the circuit court denied Zemanovic’s motion, concluding that the officer had the requisite reasonable suspicion of intoxicated driving to justify the traffic stop. Zemanovic ultimately pled to OWI, second offense, and was sentenced. He now appeals.

Standard of Review

¶7 Reviewing a circuit court’s ruling on a motion to suppress evidence, we apply the clearly erroneous standard to the court’s factual findings. *State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010). Our review of whether the facts constitute reasonable suspicion, however, is de novo. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 462, 685 N.W.2d 869.

¶8 In order for an investigatory stop to be justified by reasonable suspicion, the officer must possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. *State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. While a mere hunch is insufficient, “police officers are not required to rule out the possibility of innocent behavior before

initiating a brief stop.” *Id.* (quoting *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)). As our supreme court has explained:

[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.

Young, 294 Wis. 2d 1, ¶21 (alteration in original) (quoting *Anderson*, 155 Wis. 2d at 84). Indeed, “[i]t has been termed ‘the essence of good police work’ to briefly stop a suspicious individual ‘in order to ... maintain the status quo momentarily while obtaining more information.’” *State v. Williamson*, 58 Wis. 2d 514, 518, 206 N.W.2d 613 (1973) (citing *State v. Chambers*, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972)).

¶9 In determining whether reasonable suspicion exists, we must consider what a reasonable police officer would have reasonably suspected given his or her training and experience. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). We must look at the totality of the facts taken together, and as facts accumulate, reasonable inferences about their cumulative effect can be drawn. *Id.* at 58.

Discussion

¶10 We agree with the circuit court’s assessment that this case is a “close call,” but we also agree that the arresting officer had the requisite reasonable suspicion to justify the traffic stop.

¶11 Aware that the vehicle Zemanovic was operating was registered to an address in Eagle, the arresting officer became suspicious when the driver took a route he believed to be “weird” for someone who lived in Eagle. While the officer acknowledged on cross-examination that the route Zemanovic took “was, in fact, on the way to ... the Village of Eagle,” the circuit court found that “it was not the most direct route he could have gone.” In light of the officer’s direct examination testimony that he “thought it kind of weird that [Zemanovic] turned on Henry because it goes into the lake, it doesn’t go to Eagle,” we conclude the court did not clearly err with its finding at the hearing that the route Zemanovic took to Eagle was “not the most direct route” he could have taken. This raised some initial suspicion in the officer that something might be amiss with Zemanovic, prompting the officer to turn his vehicle around and attempt to locate Zemanovic again.

¶12 After locating Zemanovic, the officer observed his vehicle, over a period of one minute and forty-five seconds, veering left and right within its lane, touching the white fog line and even traveling on it and “actually riding the shoulder for a bit.” Our own review of the video is consistent with the officer’s testimony, as we observed multiple instances of movement by Zemanovic’s vehicle which could be characterized as slow weaving within its lane, including the right side tires riding on the white fog line at least once.

¶13 Furthermore, the officer made these observations around 3:30 a.m. on a Saturday night/Sunday morning,² a time of day and day of the week that lends to the suspicion that Zemanovic may have been drinking intoxicants in an amount greater than one might consume at other times of day or on other days of the week.

² We take judicial notice that April 17, 2016, was a Sunday.

See *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, ¶36, 733 N.W.2d 634 (time of night “does lend some further credence” to an officer’s suspicion of intoxicated driving); see also *State v. Lange*, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (concluding the time of day is relevant for an OWI probable cause (or reasonable suspicion) determination and “[i]t is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning”).

¶14 To satisfy the Fourth Amendment to the United States Constitution, an officer’s actions ultimately must be reasonable. See *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”). Officers on patrol often have a difficult balancing decision to make—continue to observe a suspected drunk driver to further confirm, or allay, the officer’s suspicions even though doing so continues the risk of a serious accident if the driver is indeed intoxicated, or conduct a traffic stop sooner. In this case, the arresting officer got that balance just right. The officer turned on his emergency lights to effectuate the traffic stop only after Zemanovic’s confirming suspicious movement of weaving toward the white fog line one final time and traveling along it for some distance. At that point, all of the identified factors accumulated to give the arresting officer reasonable suspicion that Zemanovic was operating his vehicle while impaired. The officer’s handling of the situation and decision to conduct the traffic stop when he did to further investigate was “good police work.” See *Williamson*, 58 Wis. 2d at 518.

¶15 Considering the totality of the circumstances, we conclude the officer had reasonable suspicion to perform the traffic stop for further investigation.

By the Court.—Judgment affirmed.

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

