

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 2, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**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.

**No. 00-1305**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**COUNTY OF DANE,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SCOTT E. PERNOT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed.*

¶1 DEININGER, J.<sup>1</sup> Scott Pernot appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

(OMVWI).<sup>2</sup> He claims the arresting deputy did not have the reasonable suspicion required for a police stop, and that the trial court consequently erred in denying his motion to suppress the evidence acquired after the stop. We disagree and affirm.

## **BACKGROUND**

¶2 The arresting deputy was the only witness to testify at the hearing on Pernot's motion to suppress, and he was not cross-examined. The facts are thus not in dispute.

¶3 At approximately 2 a.m., a Dane County Sheriff's Deputy noticed the passenger-side tires of an approaching vehicle "completely" cross the white fog stripe on a rural county highway by "three to six inches." The deputy testified that there could have been "numerous" reasons that the vehicle crossed the fog line, but he thought that the driver could have been intoxicated because "[s]tatistically there is a higher number of impaired drivers on the road at that time [2 a.m.]." The deputy turned around and followed the vehicle. He did not observe any obstructions in the road that would have required the driver of the vehicle to cross the fog line.

¶4 While the deputy was following the vehicle, the driver (later identified as Pernot) turned into a strip mall, located at the northern limit of the Village of Oregon. All of the businesses in the mall appeared to have been closed. At this point, the deputy caught up with Pernot's vehicle, activated his emergency lights, and pulled into the lot. Pernot did not stop his vehicle but continued through the lot toward the rear of a tavern. He stopped near the rear or side door

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<sup>2</sup> The trial court also found Pernot guilty of operating with a prohibited alcohol concentration but entered a single judgment of conviction. *See* WIS. STAT. § 346.63(1)(c).

of the bar, got out of his vehicle, and walked to the door. The deputy stopped near Pernot's vehicle and yelled twice for Pernot to stop, but he did not do so. Pernot tried to open the bar's door, but it was locked, and he waited at the door as the deputy approached.

¶5 Pernot moved to suppress all evidence obtained as a result of the stop, claiming that the deputy did not have reasonable suspicion to make the stop. The court denied the motion, and after a stipulated trial, found Pernot guilty of both OMVWI and operating with a prohibited alcohol concentration. Pernot appeals the subsequently entered judgment of conviction.

### ANALYSIS

¶6 When reviewing a trial court's order denying a motion to suppress evidence, we will uphold the trial 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). Here, the facts are undisputed. Whether these facts add up to reasonable suspicion is a question of law which we review de novo. *See State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶7 An officer must have reasonable suspicion of illegal activity in order to justify an investigative stop. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968); WIS. STAT. § 968.24. Reasonable suspicion is based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." *Terry*, 392 U.S. at 21. Reasonableness is an objective standard that is measured by looking at the "totality of the circumstances." *Richardson*, 156 Wis. 2d at 139.

¶8 Pernot argues that the deputy did not have reasonable suspicion to conduct the investigatory stop. We conclude, however, that the deputy's decision to stop Pernot was based on more than a "mere hunch." See *State v. Angiolo*, 186 Wis. 2d 488, 504-05, 520 N.W.2d 923 (Ct. App. 1994). The deputy's observation of Pernot's vehicle crossing over the highway fog line at or near "bar time," and its subsequent entrance into a largely deserted parking lot adjacent to closed businesses, support the deputy's reasonable suspicion that Pernot might be OMVWI.

¶9 The reasonableness of a stop depends on "all the facts and circumstances that are present at the time of the stop." *State v. King*, 175 Wis. 2d 146, 152, 499 N.W.2d 190 (Ct. App. 1993). We agree with the trial court that the stop did not occur until the deputy caught up with Pernot after he had left his vehicle and walked to the rear of the closed tavern. See *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (No seizure occurs when a "subject does not yield" to a show of authority; one who "continues to flee" after an officer has yelled "'Stop, in the name of the law!'" has not yet been seized.).

¶10 Prior to the time of the stop, the deputy had observed Pernot engage in suspicious behavior. The deputy testified that he saw no external reason for Pernot's swerve outside the fog line. Although he testified that there could have been several reasons for it other than intoxication (including tiredness, reaching for an object, or a vehicle alignment problem), the deputy was not required to rule out the possibility of innocent behavior before stopping Pernot. See *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). In order to determine what is reasonable under the circumstances, we must inquire, "What would a reasonable officer reasonably suspect in light of his or her training and experience?" *Id.* at 83-84. Based on his eight years of experience as a deputy

with the Dane County Sheriff's Department, he knew that impaired drivers are often on the road at 2 a.m. and could reasonably suspect that Pernot was driving while impaired after observing the vehicle maneuver outside the fog line.

¶11 Pernot engaged in further suspicious activity when he turned into the strip mall parking lot, where all the businesses were apparently closed for the night, and when he failed to stop when the deputy activated his emergency lights and then called for him to stop. *See U.S. v. Rickus*, 737 F.2d 360, 365 (3rd Cir. 1984) (concluding that “traveling through a closed business district at 3:30 in the morning at a speed 15-20 miles per hour below the posted speed limit” is a factor in assessing reasonable suspicion); *U.S. v. Buckhannon*, 975 F. Supp. 1432, 1434 (D. Kan. 1997) (citing “[a] number of cases [which] have found reasonable suspicion to stop a vehicle which has parked near a closed business late at night when the defendant engages in suspicious behavior when he or she becomes aware of the officer's presence.”).

¶12 Suspicious activity is often “ambiguous ... [and] the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal.” *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). The deputy observed possible impaired driving and a suspicious entrance into a largely deserted parking lot at 2 a.m., followed by Pernot's initial failure to heed the deputy's signals to stop. We conclude that these articulable facts justified the investigative stop.<sup>3</sup>

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<sup>3</sup> The State also argues that Pernot's stop was justified because the deputy had observed a traffic violation, “unsafe lane deviation,” under WIS. STAT. § 346.13(1). Pernot questions, as do we, whether traversing the “fog line” along the outer edge of a highway constitutes a deviation from one's “traffic lane.” We do not address the question, however, inasmuch as we conclude that even absent an observed traffic violation, the deputy had the requisite reasonable suspicion at the time he stopped Pernot.

## CONCLUSION

¶13 For the reasons discussed above, we affirm the appealed judgment.

*By the Court.*—Judgment affirmed.

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

