

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 01-0444-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF BROOKFIELD,

PLAINTIFF-APPELLANT,

V.

DANIEL D. ULMEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
LEO F. SCHLAEFER, Reserve Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.¹ The City of Brookfield appeals from an order dismissing two uniform traffic citations that charged Daniel D. Ulmen with operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) and (g) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

with a prohibited alcohol concentration (PAC) respectively. The dismissal order followed the trial court's ruling that the temporary detention of Ulmen's vehicle was not authorized under WIS. STAT. § 968.24. We disagree with the trial court's ruling that the stop of Ulmen's vehicle was improper under § 968.24. Therefore, we reverse the order suppressing the evidence and dismissing the citations. We remand for further proceedings.

FACTS AND TRIAL COURT PROCEEDINGS

¶2 The controlling facts are not in dispute. We take them from the testimony of City of Brookfield Police Officer Chris Drewek, who was the sole witness at the hearing on Ulmen's motion to suppress. On August 3, 2000, at approximately 2:17 a.m., Drewek was following a motor vehicle driven by Ulmen traveling at a speed of approximately twenty-five miles per hour in a forty mile per hour speed zone. Given the road and weather conditions, Drewek thought this was unusual. Drewek followed Ulmen for about one-quarter of a mile to the intersection of Greenfield Avenue and Sunnyslope Road where Ulmen stopped for a red light and signaled a left turn onto Sunnyslope. When the light turned green, Ulmen proceeded into the intersection about ten feet and began to make the turn. Ulmen then realized that Sunnyslope was blocked off due to construction and "jerked" his vehicle to the right and traveled in the opposite direction on Sunnyslope at approximately ten miles per hour. Ulmen then drove into a gas station parking lot located on the corner of Sunnyslope and Greenfield and stopped his vehicle. The gas station was closed for business.

¶3 Drewek considered Ulmen's driving conduct unusual, confused and suspicious. As a result, he made contact with Ulmen and the other three occupants of the motor vehicle. Drewek noticed an odor of intoxicants coming from Ulmen, so he had Ulmen perform some field sobriety tests. Based on Ulmen's

unsatisfactory performance of these tests, Drewek arrested Ulmen for OWI. In due course, the City charged Ulmen with OWI and PAC.

¶4 Ulmen responded with a motion to suppress the evidence obtained as a result of Drewek's temporary stop of his vehicle and the ensuing arrest. As noted, Drewek was the only witness at the suppression hearing. At the close of the hearing, the trial court ruled that Drewek did not have reasonable suspicion under WIS. STAT. § 968.24 to temporarily detain Ulmen's vehicle. In particular, the court noted that Drewek had not observed any weaving, swerving or any other illegal activity by Ulmen. The court concluded, "Given the totality of the circumstances the Court cannot find that this was that kind of unusual activity for the time period that this was observed that would amount to a reasonable and articulable suspicion to stop this vehicle." Following this ruling, the court entered an order dismissing the citations against Ulmen. The City appeals.

STANDARD OF REVIEW

¶5 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law that we decide de novo without deference to the circuit court's decision. *State v. Fields*, 2000 WI App 219, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

DISCUSSION

¶6 WISCONSIN STAT. § 968.24 is a codification of the rule announced by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). *Fields*, 2000 WI App 219 at ¶10. The statute provides, in relevant part, that "a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about

to commit or has committed a crime” Sec. 968.24. The statute extends to civil forfeitures as well as crimes. *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991).²

¶7 To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of illegal activity has taken or is taking place. The question of whether the officer’s suspicion was reasonable is a commonsense test: was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime? An inchoate and unparticularized suspicion or hunch will not suffice. However, the officer is not required to rule out the possibility of innocent behavior. *Fields*, 2000 WI App 219 at ¶10.

¶8 In *Adams v. Williams*, 407 U.S. 143 (1972), the United States Supreme Court stated:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable in light of the facts known to the officer at the time.

² Ulmen argues that the probable cause standard, not the reasonable suspicion standard of WIS. STAT. § 968.24, governs traffic stops for noncriminal violations. In support, Ulmen cites *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *affirmed by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. However, the question presented in *Longcore* was whether the officer had probable cause to make an arrest despite the officer’s incorrect understanding of the law—not whether the officer had reasonable suspicion to temporarily detain the vehicle. *Id.* at 8-9. We therefore reject Ulmen’s argument that *Longcore* controls. Instead, we abide by the holding of *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991), that § 968.24 applies to civil forfeitures as well as crimes.

Adams, 407 U.S. at 145-46 (citations omitted).

¶9 In *State v. Jackson*, 147 Wis. 2d 824, 434 N.W.2d 386 (1989), our supreme court said:

Doubtless, many innocent explanations for Jackson's conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal.... We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.

Id. at 835.

¶10 In conducting our review in this case, we fully respect and honor the factual determinations made by the trial court. Nonetheless, we disagree with the court's legal conclusion that the totality of the circumstances observed by Drewek did not constitute reasonable suspicion under WIS. STAT. § 968.24. As noted, we review this question de novo. *Fields*, 2000 WI App 219 at ¶9.

¶11 Drewek first observed Ulmen traveling approximately fifteen miles per hour under the speed limit. While not illegal, most drivers do not operate a vehicle at this rate of reduced speed. Next, Drewek observed Ulmen start to make a left turn onto Sunnyslope but suddenly jerk to the right because the roadway on Sunnyslope was blocked due to construction. Perhaps this erratic driving was due to Ulmen's failure to earlier see the blockade, but a more alert driver might well have seen the obstruction prior to commencing the turn. Ulmen then traveled in the opposite direction on Sunnyslope at approximately ten miles per hour, again an unusually slow speed. Finally, Drewek observed Ulmen drive into the gas station property and park his vehicle. Drewek found this suspicious because the station

was closed to business. We conclude that these successive episodes created a mounting set of collective facts that constituted reasonable suspicion under WIS. STAT. § 968.24.

¶12 Ulmen compartmentalizes his conduct, pointing out that his rate of speed, his sudden change of direction as he was turning, and his turning into the gas station property did not violate any rule of the road or other law. True, but “[r]easonable suspicion is determined from the totality of the circumstances within an officer’s knowledge.” *State v. Amos*, 220 Wis. 2d 793, 800, 584 N.W.2d 170 (Ct. App. 1998). We agree, as did Drewek in his testimony, that Ulmen’s unusual driving could suggest a driver who was merely confused. But Ulmen’s driving conduct could equally suggest a driver who was impaired by alcohol or other substances contrary to WIS. STAT. § 346.63(1). Confronted with those competing inferences, Drewek saw a commonsense need, in the words of *Jackson*, to temporarily freeze the situation by stopping Ulmen’s vehicle in order to resolve the ambiguity. *Jackson*, 147 Wis. 2d at 835.

¶13 Ulmen points to other factors in support of his cause. He did not weave or swerve in his lane of traffic, he stopped at the red stop light at the intersection of Greenfield and Sunnyslope, he signaled his left turn, and he was not prohibited from entering into the gas station property by no-trespassing signs. But by its very nature, a *Terry* situation will usually present factors on both sides of the question. And the law does not require that the officer first rule out the possibility of innocent behavior. *Fields*, 2000 WI App 219 at ¶10. Instead, the task for the police officer in the first instance, and the courts thereafter, is to determine whether the ambiguity created by such conflicting facts nonetheless satisfies the reasonable suspicion standard of WIS. STAT. § 968.24. In this case, we conclude that this standard was satisfied.

¶14 The Supreme Court has said that a police officer is not required to simply shrug his or her shoulders and allow a crime to occur or an offender to escape. *Adams*, 407 U.S. at 145-46. We conclude that Drewek properly maintained the status quo by briefly stopping Ulmen's vehicle to resolve the ambiguity presented by Ulmen's driving conduct. *See id.*

CONCLUSION

¶15 We hold that the totality of the circumstances confronting Drewek constituted reasonable suspicion under WIS. STAT. § 968.24. As such, Drewek's temporary detention of Ulmen was valid, and the evidence obtained as a result thereof is admissible. We reverse the order dismissing the citations against Ulmen and we remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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

