

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2011

A. John Voelker
Acting 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. 2010AP2672-CR

Cir. Ct. No. 2010CT435

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW M. GILBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge.¹ *Affirmed.*

¹ Judge Linda M. Van De Water entered the order denying Gilbert's motion to suppress; thereafter, Judge Haughney entered the final judgment.

¶1 ANDERSON, J.² In this appeal, Matthew M. Gilbert limits his challenge to the reasonable suspicion to conduct a traffic stop. In particular, he asserts that the arresting officer did not articulate facts that gave rise to a reasonable suspicion of equipment violations warranting an investigative traffic stop. He also contends that “the circuit court failed to make an objective legal analysis of the facts” when it concluded there was reasonable suspicion to conduct the stop. We reject his claims and affirm.

¶2 Town of Oconomowoc Police Officer Brad Priebe was on patrol close to bar closing time following an older model Volvo when he observed the lamp over the rear registration plate was burned out. He testified that it was a citable equipment violation not to have the rear registration plate properly illuminated.³ He followed the Volvo for several blocks, and when it braked to slow down, he noticed that the brake lamps were inoperable or burned out. He testified that inoperable brake lamps were also a citable equipment violation.⁴

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

³ WISCONSIN STAT. § 347.13(3) provides:

No person shall operate on a highway during hours of darkness any motor vehicle upon the rear of which a registration plate is required to be displayed unless such motor vehicle is equipped with a lamp so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear. Such lamp may be incorporated as part of a tail lamp or may be a separate lamp.

⁴ WISCONSIN STAT. § 347.14 provides:

(continued)

After making these two observations, he activated his emergency lights and stopped the Volvo, identifying Gilbert as the driver.

¶3 On cross-examination, Priebe was asked to clarify his observations. He conceded that he was not able to identify which of the brake lights were not functioning, but continued to insist that the brake lamps were not working properly because the two taillight assemblies did not look uniform when the Volvo slowed down. And, when questioned, he also agreed that when he observed the rear registration plate, he was behind the Volvo with his headlights illuminating the registration plate and he never went to the rear of the Volvo to determine if the registration plate light was illuminated.

¶4 The circuit court rejected Gilbert's argument that the totality of Priebe's testimony did not constitute specific articulable facts supporting reasonable suspicion to conduct a investigative stop. The court ruled:

[H]e observed an older Volvo with the registration lamp on the license plate burned out, which is an equipment violation.... [T]he officer saw the vehicle turn and no brake lamps were operable. They were either inoperable or burned out, therefore another equipment violation....

(1) No person shall operate a motor vehicle ... upon a highway unless such motor vehicle ... is equipped with at least one stop lamp mounted on the rear and meeting the specifications set forth in this section.... A stop lamp may be incorporated with a tail lamp. No vehicle originally equipped at the time of manufacture and sale with 2 stop lamps shall be operated upon a highway unless both such lamps are in good working order.

(2) A stop lamp shall be so constructed as to be actuated upon application of the service or foot brake or separate trailer brake and shall emit a red or amber light plainly visible and understandable from all distances up to 300 feet to the rear during normal sunlight when viewed from the driver's seat of the vehicle following.

The court will find that there was reasonable suspicion, that the person is about to or has committed a crime or, in this case, a traffic violation or two equipment violations, which are citable offenses.⁵

¶5 Gilbert appeals. His sole complaint is that the officer could not articulate any specific observations justifying an investigative stop. He argues that the “circuit court relied upon the officer’s direct testimony, with apparent uncertainty. Therefore, the circuit court clearly erred in reaching its factual conclusions regarding the rationale [for] the stop.”

¶6 Investigative traffic stops are subject to the constitutional reasonableness requirement. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The question we must answer is whether the State has shown that there were “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of the stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The burden of establishing that an investigative stop is reasonable falls on the State. *Post*, 301 Wis. 2d 1, ¶12. The determination of reasonableness is a commonsense test. *Id.*, ¶13.

¶7 The crucial question is whether the facts of the case 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 crime. *Id.* This commonsense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from

⁵ The circuit court apparently believed that Priebe’s activating his turn signal two or three blocks before turning was a traffic offense; while a vehicle with a blinking turn signal for two or three blocks is annoying, it is not a traffic offense. WISCONSIN STAT. § 346.34(1)(b) requires a turn signal be activated at least one hundred feet before an intended turn.

unreasonable intrusions. *Id.* The reasonableness of a stop is determined based on the totality of the facts and circumstances. *Id.*

¶8 Whether reasonable suspicion to conduct a traffic stop exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. When reviewing questions of constitutional fact, we apply a two-step standard of review. *Id.* First, we will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *Id.* Second, based on the historical facts, we review de novo whether a reasonable suspicion justified the stop. *Id.*

¶9 Gilbert does not challenge the right of a police officer to conduct an investigative stop for an observed equipment violation. He contends the circuit court ignored Priebe's testimony on cross-examination that he could not specifically identify which brake lights were inoperable and he did not personally check to determine if the registration plate light was illuminated.

¶10 The credibility of a witness and the weight to be accorded the evidence is for the circuit court to decide, not this court. *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). When more than one conclusion can be drawn from the credible evidence, we must accept the one drawn by the circuit court. *Siker v. Siker*, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999). In this case, the circuit court obviously chose to adopt the inferences to be drawn from Priebe's direct examination that the officer had observed two equipment violations and to reject the cross-examination that Gilbert argues partially impeaches that testimony. We are not at liberty to reach the conclusion Gilbert is advocating.

¶11 Nor can we say that Priebe's cross-examination impeached his direct examination. While reasonable suspicion cannot be based merely on an inchoate and unparticularized hunch, *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305, it does not require mathematical precision. As long as Priebe reasonably believed the registration plate lamp and the brake lamps were inoperable, he had reasonable suspicion to make the stop. His inability to testify as to which lights were actually inoperable does not take away from the specific and articulable facts he acquired before stopping Gilbert.

By the Court.—Judgment affirmed.

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

