

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2003

Cornelia G. Clark
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. 03-0701-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02-CT-000083

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSEMARY J. DUDZIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

¶1 DEININGER, P.J.¹ Rosemary Dudzik appeals a judgment convicting her of third-offense operating a motor vehicle while under the influence of an intoxicant (OMVWI). She claims the trial court erred in denying her motion

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

to suppress evidence gathered following an allegedly unlawful traffic stop. We conclude the trial court did not err in upholding the stop, and we therefore affirm the appealed judgment.

BACKGROUND

¶2 A patrolling Village of Plover police officer approached a four-way stop at approximately 2:50 a.m. and observed a vehicle stop and make what he considered to be a faster and wider than normal turn. He followed the vehicle for approximately one-half to three-quarters of a mile. The officer testified that he was suspicious that the driver might be impaired in some way. During the time the officer followed the vehicle, he observed it weave within its lane of travel approximately four times. He testified that he then turned on his flashing lights, stopped the vehicle in a driveway, and identified Dudzik as the driver. He subsequently arrested her for OMVWI.

¶3 Dudzik moved to suppress all evidence obtained as a result of the stop on the grounds that the officer did not have reasonable suspicion to stop her. Dudzik testified at the suppression hearing that she did not see a squad car at the four-way stop. She also claimed to be quite familiar with the road where she was stopped and had traveled it many times. Dudzik stated her belief that she had made the turn the same way she always did and that there was nothing unusual about her turn prior to the stop. Dudzik explained the four instances of weaving, saying that she adjusted her rear view mirror twice, avoided a low spot near a driveway, avoided a pot hole in the road, and maneuvered to make it over a small hump of snow to get into the driveway of her boyfriend's house. Dudzik testified that the officer had not turned on his flashing lights until after she had parked and exited her vehicle.

¶4 After hearing the officer's and Dudzik's testimony, the trial court stated that it was not confident of the officer's testimony about the direction, speed and wideness of Dudzik's turn.² Relying instead on the time of night and the officer having observed the car weave four times within one-half to three-quarters of a mile, the court concluded the officer had a reasonable suspicion that its driver might be impaired. After the court denied her suppression motion, Dudzik pled no contest and was convicted of OMVWI. She appeals, challenging only the denial of her suppression motion.³

ANALYSIS

¶5 When reviewing a trial court's determination regarding the suppression of evidence, we will uphold the trial court's factual findings unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, whether an investigative stop meets statutory and constitutional standards is a question of law which we decide de novo. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶6 An investigative stop is a seizure that intrudes upon the right to be free of governmental influence. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Investigative stops are allowed because there is a "strong public interest in

² The court's skepticism of the officer's account stemmed in large measure from the fact that the officer first testified that Dudzik made a wide right turn but conceded on cross-examination that she had in fact entered the intersection from the other direction and made a left turn.

³ Notwithstanding a plea of guilty or no contest, a defendant may appeal a judgment of conviction in order to challenge the denial of a motion to suppress evidence. *See* WIS. STAT. § 971.31(10).

‘solving crimes and bringing offenders to justice.’” *State v. Harris*, 206 Wis. 2d 243, 259, 557 N.W.2d 245 (1996) (citation omitted). Because, as the State concedes, the officer did not observe Dudzik violate any traffic laws, there needed to be reasonable suspicion of illegal activity in order to perform a proper investigative stop. *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968). “[I]f any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances,” an investigative stop is permissible. *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989).

¶7 Reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21, *quoted in Richardson*, 156 Wis. 2d at 139. Reasonableness is an objective standard that takes into consideration the totality of the circumstances. *Richardson*, 156 Wis. 2d at 139-40. “It is a common sense question, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions.” *Jackson*, 147 Wis. 2d at 831. Reasonable suspicion can be formed from “a series of acts, each of which are innocent in themselves.” *State v. Young*, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). However, an officer must have more than an “inchoate or unparticularized suspicion or ‘hunch,’” in order to justify an investigative stop. *Terry*, 392 U.S. at 27, *quoted in State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

¶8 As we have noted, the trial court discounted the officer’s inconsistent testimony regarding Dudzik’s wide turn from the stop sign. Instead, the court relied on two virtually undisputed facts in concluding that the officer had the requisite reasonable suspicion to stop Dudzik: the time of night, and her weaving within her lane four times over a one-half to three-quarter mile distance.

Because the trial court “is the arbiter of credibility,” we accept the facts found and relied upon by the trial court. *State v. Fields*, 2000 WI App 218, ¶11, 239 Wis. 2d 38, 619 N.W.2d 279. We, like the trial court, conclude that these two facts provide reasonable suspicion that Dudzik was OMVWI.

¶9 Although Dudzik provided innocent explanations at the hearing for her car weaving four times, the officer was not required to rule out the possibility of innocent behavior before stopping her car. See *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Suspicious activity is often ambiguous. An investigative stop serves the purpose of resolving the ambiguity and establishing whether the activity is legal or illegal. *Jackson*, 147 Wis. 2d at 835. We conclude that the officer’s observation of a vehicle weaving in its lane of traffic four times within one-half to three-quarters of a mile just after “bar time” gives rise to a reasonable suspicion of impairment.

¶10 Dudzik suggests that because the officer testified he suspected impairment immediately following her turn from the stop sign (prior to his observing any weaving), we should not rely on the weaving to determine whether reasonable suspicion existed. And, because the trial court discounted the officer’s testimony regarding the wide turn and quick start, in Dudzik’s view, the only fact remaining to support reasonable suspicion was the time of night. We reject this argument because the officer did not effect a traffic stop until after he had observed the four instances of weaving.

¶11 Regardless of when the officer’s actual suspicions were aroused, or when he formed the subjective intent to stop the vehicle, it is undisputed that he had observed the weaving before he turned on his flashing lights and interfered with Dudzik’s liberty. The dispositive question is thus whether, under all of the

circumstances known to the officer at the time of the stop, “would a reasonable police officer reasonably suspect in light of his or her training and experience” that criminal activity was afoot? *Jackson*, 147 Wis. 2d at 834. We conclude that an officer with eight years’ experience⁴ could reasonably suspect that alcohol-impaired drivers are likely to be on the road following “bar time,” and that a vehicle swerving within its lane several times over a short distance might well be operated by such a driver.

CONCLUSION

¶12 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.

⁴ The arresting officer testified that he had been employed as a village police officer for “approximately eight years.”

