

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2005

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. 2005AP327-CR

Cir. Ct. No. 2004CT9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ESTHER M. PHILLIPS-CROUCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Esther Phillips-Crouch appeals a judgment of conviction for operating while intoxicated (OWI), third offense. She argues the arresting officer did not have reasonable suspicion to stop her and therefore any

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

evidence resulting from the stop should have been suppressed. We disagree and affirm the judgment.

BACKGROUND

¶2 On January 10, 2004, at approximately 2:30 a.m., Sturgeon Bay police officer Robert Osborne observed Phillips-Crouch driving in what he described as an “overly cautious” manner. He stated she was driving fifteen to twenty miles per hour in a twenty-five mile-per-hour zone. Osborne testified he did not observe any traffic violations, but he saw her stop at an intersection where there was no stop sign. He then observed her make a drifting turn to the right. She then again came to a stop at an intersection where there was no stop sign. Later, she turned on her left turn signal but swung to the right before making the left turn.² At this time, Osborne decided to investigate and stopped Phillips-Crouch’s vehicle. Phillips-Crouch was ultimately arrested for OWI. A video camera in Osborne’s squad recorded much of the events.

¶3 Phillips-Crouch was charged with OWI, third offense, as well as operating with a prohibited alcohol concentration (PAC), also third offense. She moved to suppress evidence resulting from the stop, arguing Osborne did not have reasonable suspicion to stop her. The circuit court denied the motion. It reviewed the videotape and noted that “this was a borderline case,” but concluded that Osborne’s “credible testimony provides the basis for a legal stop.” Phillips-Crouch subsequently pled no contest to the OWI charge.

² The State mischaracterizes this maneuver as turning on her left turn signal but making a right turn. However, the transcript of the suppression hearing does not indicate she turned right. Rather, Osborne testified that “she activated her left turn signal to make a left turn, but prior to making that left turn she swung her car to the right and made her turn.”

DISCUSSION

¶4 On appeal, Phillips-Crouch renews her argument that Osborne did not have reasonable suspicion to stop her. To justify an investigatory seizure, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating or has violated the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. “The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold the circuit court’s findings of fact unless clearly erroneous, WIS. STAT. § 805.17(2), but we review de novo whether those facts meet the constitutional standard. *Williams*, 241 Wis. 2d 631, ¶18.

¶5 Phillips-Crouch argues that the videotape does not support Osborne’s testimony that she stopped where there was no stop sign. Osborne is heard on the tape commenting that Phillips-Crouch “braked at that intersection” but that the tape does not show her coming to a complete stop. Thus, she contends the only factors remaining are the time of day and her slow speed. She argues these were not enough to give Osborne reasonable suspicion to stop her. As Osborne testified, he did not observe her commit any traffic violations, nor was she weaving in her lane.

¶6 The State responds that the tape does not show the entire sequence of events. Osborne testified that one of the times that Phillips-Crouch came to a

complete stop is not on the tape. The circuit court stated that it found Osborne’s testimony credible. The credibility of a witness is for the trial court to determine, and we will not upset such a finding unless clearly erroneous. WIS. STAT. § 805.17(2). We therefore must accept Osborne’s testimony that Phillips-Crouch came to complete stops where there were no stop signs.

¶7 Like the circuit court, we too acknowledge that this is a close case. However, we conclude that Osborne had reasonable suspicion justifying the stop. First, the stop occurred at 2:30 a.m. “The hour of the day may ... be relevant in that the individual’s activities may or may not be consistent with the typical behavior of law-abiding citizens at that time.” *State v. Kyles*, 2004 WI 15, ¶58, 269 Wis. 2d 1, 675 N.W.2d 449. Second, Phillips-Crouch was driving five to ten miles per hour below the speed limit. Third, Osborne observed Phillips-Crouch stop on two separate occasions where there was no stop sign. Fourth, Osborne twice observed Phillips-Crouch make unusual turns.

¶8 Osborne testified he has been a patrol officer for fourteen years and had been involved in “well over 500” arrests of impaired or intoxicated drivers. We conclude that under the circumstances presented here, a reasonable officer with Osborne’s training and experience would reasonably suspect that Phillips-Crouch was operating while intoxicated. Thus, the stop was justified.

By the Court.—Judgment affirmed.

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