**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 5, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP3098-CR** **Cir. Ct. No. 2004CF165**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM T. ANDERSON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. William Anderson appeals a judgment of conviction for operating while intoxicated, sixth offense, contrary to WIS. STAT. § 346.63(1)(a).[1] Anderson contends the trial court erred by denying his suppression motion because specific and articulable facts were lacking for the stop of his vehicle. We agree. Accordingly, we reverse the judgment and order and remand with directions to grant the motion to suppress.

¶2 The facts are not in dispute. A sheriff's deputy was dispatched to a tavern in rural Boyd based on a report from the tavern owner that Anderson had possibly been trying to lure children out of the bar by showing them his dog. Anderson had left the bar prior to the deputy's arrival. The deputy went in the direction Anderson had reportedly gone and came upon Anderson at an intersection. The deputy immediately pulled him over for "further investigation." While speaking to Anderson, the deputy smelled the odor of intoxicants, which led to field sobriety tests and a preliminary breath test. Anderson was subsequently arrested and charged with OWI, sixth offense.

¶3 At the preliminary hearing, the arresting officer testified that upon his arrival at the bar he asked the owner if she saw anything improper. The owner indicated that "she did not see or hear of anything improper taking place." The deputy testified that he did not observe Anderson violate any traffic laws in the course of following Anderson's vehicle. There were no complaints from any bar patrons that Anderson had done anything improper, and the deputy did not speak to any patrons to determine whether any factual basis existed to support the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

complaint. On cross-examination, the deputy was asked the question, "Did you ever gather any evidence to support the complaint from the bar?" The deputy responded, "No, I didn't believe there was anything that suggested he was trying to lure kids out of the tavern." The trial court found probable cause and bound the case over for arraignment.

¶4 After an Information was filed, Anderson filed a motion to suppress based on lack of reasonable suspicion for the stop. Both the defense and the State apparently argued the motion based on the evidence at the preliminary hearing and the facts alleged in the criminal complaint. The court denied the motion, concluding there was a reasonable, articulable basis for the officer to "check it out and make sure nothing was going on that shouldn't have been going on." Anderson then negotiated a plea agreement and the court imposed an eight-month sentence that was stayed pending appeal.

¶5 The determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. ***State v. Powers***, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. Findings of fact are upheld unless clearly erroneous, but we review the determination of reasonable suspicion de novo. ***Id.*** At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). An "inchoate and unparticularized suspicion or 'hunch'…" will not suffice. ***Id.*** (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). When determining whether a set of facts gives rise to reasonable suspicion, "courts should apply a commonsense approach to strike a balance between the interests of the individual being stopped to be free from unnecessary or unduly intrusive

searches and seizures, and the interests of the State to effectively prevent, detect, and investigate crimes." ***State v. Rutzinski***, 2001 WI 22, ¶15, 241 Wis. 2d 729, 623 N.W.2d 516.

¶6 We conclude that the stop of Anderson's vehicle was not based on specific and articulable facts sufficient to raise an inference that Anderson had engaged in wrongful activity. The concern raised by the owner was that Anderson was attempting to lure children out to his truck. However, the deputy testified at the preliminary hearing as follows:

> A: She was concerned because there was a lot of people in the tavern that day and there was a subject in there that was bringing a dog in and he was told to take the dog out, came back in the bar and she felt that there was – he was trying to lure the children out to his truck or whatever. I am not exactly sure what it was.
>
> Q: Anyway, she was concerned, she was concerned about this man's behavior?
>
> A: Correct.
>
> ....
>
> Q: After receiving this information, what, if anything, did you do?
>
> A: At that point, I asked her if she saw anything improper take place and she said she did not see or hear of anything improper taking place.
>
> Q: Did she indicate why she was concerned about this behavior?
>
> A: Just possibly he may be attempting to abduct a child or possible sexual assault or something of that nature.

¶7 In his report, which was incorporated into the criminal complaint, the deputy made no statements indicating that he observed Anderson committing any offenses, traffic or otherwise, prior to the stop of the vehicle. The owner of

the tavern was the only person the deputy spoke with at the scene. The deputy's own testimony on cross-examination supports the objective lack of reasonable suspicion: "I didn't believe there was anything that suggested he was trying to lure kids out of the tavern."

¶8 The State asserts that "were this court to find a lack of reasonable suspicion, it would be tantamount to declaring that when a reliable citizen tells the police that she believes she saw a man attempting to lure children into his vehicle, the police may not stop that man for further investigation." We are not persuaded. The tavern owner did not indicate that she *saw* a man attempting to lure children into his vehicle. As mentioned, the deputy testified that the owner indicated that she did not see anything improper. The deputy testified that the tavern owner was concerned because "*just possibly* he may be attempting to abduct a child or possible sexual assault or something of that nature." (Emphasis added). She did not articulate what she saw that led to her speculation. Contrary to the State's perception, this presents the "inchoate and unparticularized suspicion or hunch" prohibited by ***Terry*** and its progeny. As a result, we reverse the conviction and remand with directions to grant the motion to suppress.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.