

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2006

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. 2006AP202-CR

Cir. Ct. No. 2005CT26

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. JOAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Matthew A. Joas appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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

(OWI), second offense. He argues the arresting officer did not have reasonable suspicion to stop him and therefore the trial court should have suppressed any evidence resulting from the stop. We disagree and affirm the judgment.

FACTS

¶2 On October 3, 2004, at approximately 2:26 a.m., City of Fond du Lac Police Officer Amy Jost received a dispatch advising her that an anonymous tipster contacted the police department about an intoxicated driver in the area of Taco Bell on West Johnson Street. The tipster provided the license plate number and described the vehicle as a silver Jeep. Jost positioned her vehicle so she could observe the drive-thru at the Taco Bell. The Jeep was located in the drive-thru at that time. Jost testified that she saw the vehicle, which was driven by Joas, exit the parking lot and turn right onto westbound Johnson Street. Johnson Street is a divided road with two lanes in each direction and Joas turned into the right lane. Jost followed Joas for two large city blocks. During that time, she observed Joas “swerving from the fog line to the dashed yellow line approximately four times.” Jost then observed Joas change lanes without signaling. Jost testified, but did not state in her written report, that when Joas changed lanes he pulled in front of another vehicle in the left lane. According to her testimony, the distance between the two vehicles was less than a car length. At this time, Jost decided to investigate and stopped Joas. Following the investigation, Joas was arrested for OWI, second offense.

¶3 Joas was ultimately charged with OWI, second offense. Joas filed a motion to suppress evidence resulting from the stop, arguing that Jost did not have reasonable suspicion to stop him. The court denied the motion, relying on the following factors to find reasonable suspicion: (1) the anonymous tip of a

possibly intoxicated driver, (2) the time of night, (3) the swerving within the lane, and (4) the failure to signal before making a lane change in front of another vehicle. Joas was convicted of the offense following a jury trial.

DISCUSSION

¶4 On appeal, Joas renews his argument that Jost did not have reasonable suspicion to stop him. 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 commonsense 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 trial 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 We conclude Jost had reasonable suspicion justifying the stop on two separate grounds. First, under the circumstances of the case, a reasonable police officer could determine that Joas was having trouble controlling his vehicle and that the cause of this lack of control might be intoxication. Jost had an anonymous tip of a possibly intoxicated driver of a silver Jeep located in the area of the Taco Bell on Johnson Street. Jost found a vehicle of that description in the Taco Bell drive-thru. The stop occurred at 2:26 a.m. or as the trial court stated, in

the “wee hours” of the morning. “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. Jost observed Joas swerve in his lane of traffic *four times* over a short distance and change lanes directly in front of another vehicle without signaling.

¶6 Joas contends that weaving within a traffic lane is not unusual or illegal conduct. While Joas’ statement is true, whether the observed conduct is lawful is not determinative of whether reasonable suspicion exists to make a stop. *See State v. Waldner*, 206 Wis. 2d 51, 58-59, 556 N.W.2d 681 (1996). Reasonable inferences of criminal activity can be drawn from perfectly legal behavior. *Id.* at 59. “[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” *Id.* at 60. Here, in light of the other circumstances present, it was reasonable for Jost to infer from Joas’ swerving within his lane that he was intoxicated.

¶7 Joas urges us to disregard the trial court’s finding that he switched lanes in front of another vehicle because Jost failed to state in her written report that another vehicle was in the left lane. However, the trial court’s finding is supported by the record. *See State v. Frankwick*, 229 Wis. 2d 406, 410, 599 N.W.2d 893 (Ct. App. 1999) (reminding us that we will not disturb the trial court’s factual findings as long as they are supported by the record). Jost specifically testified that she observed the other vehicle and that she simply forgot to include that fact in her report. The trial court implicitly accepted Jost’s testimony as

credible, and we therefore do the same. *See Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (stating that we will accept the trial court's implicit findings on witness credibility).

¶8 Second, Jost observed Joas violate the law. WISCONSIN STAT. § 346.34(1)(a)3. and (b) provide, in part:

3. [No person may] [t]urn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.

(b) In the event any other traffic may be affected by such movement, no person may so turn any vehicle without giving an appropriate signal

Jost testified that Joas switched lanes in front of another vehicle without signaling and that the distance between the two vehicles was less than a car length, which was certainly close enough for the other vehicle to be affected by Joas' movement.

¶9 In a separate section of his brief, Joas challenges Jost's reliance on the anonymous tip of an intoxicated driver, complaining that it was not independently corroborated by Jost. In raising his challenge, Joas renews his arguments that we should disregard his changing lanes in front of another vehicle and his swerving within his lane of traffic. We have already rejected Joas' pleas to disregard those facts. Simply put, Jost found a vehicle similar to one the tipster described in the location the tipster provided and then made independent observations of Joas' erratic driving behavior to corroborate the tipster's claim of intoxication. Thus, the tip, coupled with those observations, gave rise to reasonable suspicion. In any event, Jost witnessed Joas make an illegal lane change. This illegal activity alone justified stopping Joas, regardless of how well the tip was corroborated.

By the Court.—Judgment affirmed.

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

