

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2007

David R. Schanker
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. 2006AP1145-CR

Cir. Ct. No. 2004CF165

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW L. BUCHOLTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Andrew Bucholtz appeals from a judgment convicting him of operating while intoxicated, fifth offense. On appeal, he challenges the circuit court's determination that the police had reasonable suspicion to stop his vehicle. We conclude that the circuit court did not err in

denying Bucholtz’s motion to suppress because the *Terry*¹ investigative stop was supported by reasonable suspicion that Bucholtz was engaged in criminal activity and by reasonable suspicion that his vehicle was the vehicle seen idling behind a closed bar in the early morning hours. Therefore, we affirm.

¶2 We apply the following standards of review to an appellate challenge to a *Terry* investigatory stop:

When we review a motion to suppress evidence, we will uphold the circuit court’s findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court’s decision. A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer’s experience, he or she reasonably suspects “that criminal activity may be afoot.” Reasonable suspicion is dependent on whether the officer’s suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime.

State v. Begicevic, 2004 WI App 57, ¶3, 270 Wis. 2d 675, 678 N.W.2d 293 (citations omitted).

¶3 The circuit court’s findings at the suppression hearing² are not disputed by the parties, and we conclude that they are not clearly erroneous. *See*

¹ *Terry v. Ohio*, 392 U.S. 1 (1968); WIS. STAT. § 968.24 (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Bucholtz’s appellant’s brief contains the required certification regarding the appendix. *See* WIS. STAT. RULE 809.19(2)(b). Counsel is required to certify that the appendix contains “relevant trial court record entries” and “the findings or opinion of the trial court.” *Id.* The appendix, in fact, contains neither, and the judgment of conviction contained in the appendix “tells us absolutely nothing about how the trial court ruled on a matter of interest to the appellant.” *State v. Bons*, 2007 WI App 124, ¶23, No. 2006AP1625-CR. In the appeal before this court, the circuit court’s findings and opinion are found in the transcript of the hearing on the motion to suppress; this document should have been included in the appellant’s appendix. In another case, we sanctioned counsel for certifying an appendix whose contents were inadequate. *Id.*, ¶25.

id. Rather, the parties dispute whether the findings support the legal standard of reasonable suspicion.

¶4 The circuit court found that Bucholtz's vehicle was idling in the parking lot behind a closed bar for approximately thirty minutes with its lights off. Individuals who were cleaning the bar became concerned about the presence of the vehicle because there had been burglaries in the area (including the bar next door). They called the police and described the vehicle and its location behind the bar. An officer responding to the scene saw the suspect vehicle a few blocks from the bar, confirmed with her lieutenant that the vehicle behind the bar had departed, and stopped the vehicle. The court concluded that the officer had reasonable suspicion to stop Bucholtz's vehicle and that the officer appropriately froze the situation to assess the circumstances of the vehicle's presence behind the bar, particularly in light of the prior burglaries in the area. During the stop, the officer discovered that Bucholtz was operating while intoxicated.

¶5 Bucholtz argues that the police did not reasonably suspect that he was involved in criminal activity or that his vehicle was the same vehicle observed idling in the bar's parking lot. We disagree and conclude that under the facts and circumstances and considering the officer's training and experience, the officer who stopped Bucholtz's vehicle reasonably suspected criminal activity.

¶6 We apply the reasonable suspicion factors discussed in *State v. King*, 175 Wis. 2d 146, 153, 499 N.W.2d 190 (Ct. App. 1993), citing *State v. Guzy*, 139 Wis. 2d 663, 677, 407 N.W.2d 548 (1987). These factors include the particularity of the vehicle's description, the size of the area in which the suspect might be found, the number of persons in the area, the direction of the suspect's flight, observed activity by the person stopped, and knowledge or suspicion that

the vehicle “has been involved in other criminality of the type presently under investigation.” *King*, 175 Wis. 2d at 153 (citation omitted).

¶7 The officer was responding to a call regarding a suspicious, occupied vehicle idling behind a bar after closing time in an area where burglaries had recently occurred.³ The vehicle was described as an older model Buick or Oldsmobile. As she was approaching the bar in response to the call, the officer spied a vehicle which she suspected was the vehicle in question. Before stopping the vehicle, the officer confirmed with her lieutenant that the suspect vehicle had departed the bar parking lot, which was a couple of blocks away. Given the previous burglaries, the early morning hour, the proximity to the bar and the deserted nature of the area, the officer reasonably inferred and suspected that the vehicle she encountered was the vehicle seen behind the bar. Under the circumstances, the officer drew a reasonable inference that a vehicle parked behind the bar might be involved in criminal activity.

¶8 Bucholtz suggests that there are numerous other innocent or innocuous reasons for parking behind a bar in the early morning hours. However, an officer who otherwise has reasonable suspicion to make a *Terry* stop is not required to rule out the possibility of innocent behavior before initiating such a stop; “suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

³ The officer learned of other burglaries at a pre-shift briefing, including a burglary at the bar next door to the bar being cleaned.

¶9 Bucholtz relies upon *State v. Harris*, 206 Wis. 2d 243, 557 N.W.2d 245 (1996), to support his claim that the police did not have reasonable suspicion to stop his vehicle. *Harris* is distinguishable because in that case, the court held that there was no reasonable, articulable suspicion to stop a vehicle after it pulled away from the curb close to an armed robbery suspect's address. *Id.* at 262. As the court noted, “[p]ulling away from a parked position at a curb on a residential street, even if close to the suspect’s address, is not reasonably suspicious behavior,” nor is “[t]hree men in a car on a residential street at 11:30 at night.” *Id.* The court concluded that the State did not meet its burden to show the facts which might have given rise to a reasonable, articulable suspicion to stop the vehicle. *Id.* at 263.

¶10 Here, in contrast, the State made a record of the information which factored into the officer’s reasonable suspicion, and the vehicle’s location and conduct were related to a concern about possible criminal activity. We deem it particularly important that the officer making the stop had previously confirmed that the vehicle matched the description provided by the original informants. This is not a *Harris* case.

¶11 We do not think that the officer’s information was too limited to rise to the requisite level of reasonable suspicion to stop Bucholtz’s vehicle.⁴ We affirm the circuit court’s denial of the suppression motion.

By the Court.—Judgment affirmed.

⁴ We note that the bar cleaners later passed the scene of the Bucholtz traffic stop, and they identified Bucholtz’s vehicle as the vehicle which had been idling behind the bar.

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

