

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 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. 2007AP792-CR

Cir. Ct. No. 2006CT124

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STEVEN F. FOWLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Reversed and cause remanded for further proceedings.*

¶1 LUNDSTEN, J.¹ The State of Wisconsin appeals the circuit court's order granting Steven Fowler's motion to suppress evidence based on an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

unconstitutional stop of Fowler's vehicle. We agree with the State that the police officer who stopped Fowler possessed reasonable suspicion for the stop. We reverse the circuit court's order, and remand to the circuit court for further proceedings.

¶2 At the suppression hearing, the officer involved testified that, on August 20, 2006, at approximately 3:05 a.m., he observed a vehicle exit from I-39 and turn eastbound onto a county highway. The officer was traveling eastbound behind the vehicle. He observed the vehicle as it approached an intersection, and also observed the vehicle make a U-turn without signaling. In the middle of the turn, the vehicle stopped in the intersection. The vehicle was blocking a lane and partially blocking the intersection, but there were no other vehicles in the vicinity.

¶3 The officer testified that the vehicle could not complete the U-turn because the intersection had an island with a traffic sign. The officer proceeded farther up the road, made a U-turn, and came around to approach the vehicle. The officer observed that the vehicle was rolling backwards and he could hear the vehicle's engine "revving in a loud manner." The vehicle then proceeded forward, traveling westbound. At that point, the officer initiated a traffic stop.

¶4 While speaking with the driver, Fowler, the officer detected an odor of intoxicants. Fowler admitted to drinking, and exhibited clues of intoxication on field sobriety tests. Fowler agreed to submit to a preliminary breath test, which registered a 0.23% blood alcohol concentration. The State charged Fowler with operating a motor vehicle while intoxicated and with operating a motor vehicle with a prohibited alcohol concentration, each as a fourth offense.

¶5 Based on the officer's testimony summarized above, the State argued that the officer was justified in stopping Fowler because Fowler failed to

signal and because Fowler made an illegal U-turn, both in violation of state statute. The circuit court rejected the State's failure-to-signal argument, concluding that the facts were insufficient to show a violation. The court also rejected the State's U-turn argument, concluding as follows:

The primary reason for the stop is what the officer thought was an [illegal] U-turn. We also have the engine revving. It wasn't enough of a description of that on the record to really indicate whether or not that seemed to be erratic driving. It could lead to that, but he just didn't have enough of a description of it to really come to that.

I'm afraid the State's case here is pretty much centered on what he thought was an illegal U-turn which was not an illegal U-turn. I don't believe that there is a factual basis proper to have made the stop.

The court granted Fowler's motion to suppress, and the State appealed.

¶6 On appeal, the State abandons its argument that Fowler made an illegal U-turn, but continues to argue that the stop was justified because Fowler unlawfully failed to signal. The State argues in the alternative that the totality of the circumstances justified the stop.

¶7 The State did not make its totality-of-the-circumstances argument below, and ordinarily “[w]e will not ... blindsides trial courts with reversals based on theories which did not originate in their forum.” *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Here, however, it appears that the circuit court considered whether the totality of the circumstances justified the stop. The court addressed the State's failure-to-signal and U-turn arguments, adding that “[w]e also have the engine revving. It wasn't enough of a description of that on the record to really indicate whether or not that seemed to be erratic driving. It could lead to that, but he just didn't have enough of a description of it to really come to that.” In other words, the circuit court appeared to consider the totality of

the circumstances, but concluded that those circumstances were insufficient to constitute a reasonable suspicion. Given that the circuit court seemed to consider the issue, and given that both the State and Fowler have briefed it, we choose to address whether the totality of the circumstances justified the stop. We conclude that it did.

¶8 Reasonable suspicion is a common-sense standard that permits a brief investigatory stop if an officer reasonably suspects that illegal activity may be afoot. *State v. Amos*, 220 Wis. 2d 793, 798-99, 584 N.W.2d 170 (Ct. App. 1998). A reasonable suspicion must be grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was engaging in illegal activity. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). The question is, “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).

¶9 The relevant facts are undisputed, and the question of whether those facts constitute reasonable suspicion is a question of law for our *de novo* review, contrary to what Fowler sometimes seems to be suggesting. *See State v. Patton*, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347 (in reviewing a circuit court’s ruling on a motion to suppress, we uphold the circuit court’s fact findings unless clearly erroneous, but the question of whether an investigatory stop meets constitutional standards is a question of law that we review *de novo*).

¶10 Here, the officer could have reasonably suspected that Fowler was driving while impaired in light of the totality of the circumstances. We briefly restate the most pertinent facts known to the officer at the time of the stop: Fowler

exited I-39 heading eastbound; made a U-turn without signaling; stopped in the intersection in the middle of the turn, thus blocking a lane and partially blocking the intersection; was unable to complete the turn apparently because of an island with a traffic sign in the intersection; began rolling backwards; revved his engine in a loud manner; and then proceeded forward, heading westbound, the direction from which he had just come.

¶11 In light of all of the circumstances, the reasonable inference arises that Fowler initially went the wrong direction because of some possible impairment. Then, in seeking to reverse course, he failed to signal and had some difficulty in maneuvering the U-turn. He also appeared to have difficulty getting or keeping his vehicle in gear, as evidenced by his vehicle's rolling backwards and loud revving.² All this occurred at approximately 3:00 a.m., a time when intoxicated drivers are more likely to be on the road.

¶12 Fowler points out that drivers commonly perform U-turns and sometimes have to back up to complete such turns. This may be true, but the question here is whether, based on *all* of the circumstances, an officer could have reasonably suspected that Fowler was driving while impaired. Although there may be innocent explanations for Fowler's driving behaviors, "conduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity." *Young*, 212 Wis. 2d at 430. "[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Waldner*, 206 Wis. 2d at 59. "Suspicious conduct by its very nature is ambiguous, and the

² The officer testified that, when the loud revving stopped and Fowler moved forward, the officer "assum[ed Fowler] got into gear."

principal function of the investigative stop is to quickly resolve that ambiguity.”
Id. at 60.

¶13 Finally, the fact that the officer may have stopped Fowler primarily because of the officer’s subjective belief that Fowler was executing an illegal U-turn is not determinative. *See State v. Kiekhefer*, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997). The test is objective: What would an officer reasonably believe based on the totality of the circumstances? The officer here could have reasonably believed that Fowler was driving while impaired.

By the Court.—Order reversed and cause remanded for further proceedings.

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

